Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-264

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

against

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. May the union-appointed trustees of a jointly-administered trust fund sue under §§ 502 and 515 of ERISA to collect contributions owed the fund by an employer without first arbitrating, with the employer-appointed trustees of the fund, the issue whether the latter should join such suit?

2. Where a participant in an employee-benefit trust fund has made demand upon the trustees thereof to sue to collect delinquent contributions owed the fund, but the latter have wrongfully failed and refused to do so, may the participant bring suit himself to collect such contributions for the fund and to remedy the trustees' refusal?

Parties to the Proceedings Below

Union-Appointed Trustees of the
Tapers Industry Insurance and Annuity Funds:

John Alfarone
Joseph Giordano
Brian Gordon

Employer-Appointed Trustees of the
Tapers Industry Insurance and Annuity Funds:

Irving Mazzer
Seymour Levine
Michael Petrulli

Other Parties to the Proceedings Below:

Daniel Jones
Bernie Wolff Construction Corp.
Component Assembly, Inc.
Nastasi-White, Inc.
Circle Industries Corp.
Quick-Way Finishers, Inc.

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Petitioners,

against

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, John Alfarone, Joseph Giordano, Brian Gordon and Daniel Jones, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14, 1986.

Opinions Below

The opinion of the Court of Appeals is reported at 788 F.2d 76. The Court of Appeals' decision denying peti-

tioners' request for rehearing and rehearing *en banc* is unreported. The decisions of the District Court for the Eastern District of New York are unreported. All are reprinted in the appendix hereto. In addition, the decision of the district court in a companion case, *Alfarone, et al. v. Nastasi-White, Inc., et al.*, CV 84-3181, is also reprinted in the appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 14, 1986. A timely petition for rehearing *en banc* was denied on May 22, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Section 301(a) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(e)(1):

> (e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary or fiduciary. State courts of competent jurisdiction

and district courts of the United States shall have concurrent jurisdiction over actions under subsection (a)(1)(B) of his section.

Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2):

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,
(B) interest on the unpaid contributions
(C) an amount equal to the greater of—
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code.

Section 515 of ERISA, 20 U.S.C. § 1145:

Delinquent contributions. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Statement of the Case

These three actions (consolidated in the Court of Appeals) are brought to collect, for certain employee-benefit welfare trust funds, contributions due from defendant employers. The plaintiffs (petitioners here[1]) are the three union-appointed trustees of the trust funds suing as fiduciaries thereof ("the Alfarone plaintiffs") and a participant in the funds ("Jones"), suing derivatively and on behalf of the class of all participants and beneficiaries.[2] The defendants are the employer-appointed trustees of the trust funds and certain employers who are parties to collective bargaining agreements with a labor organization ("Local 1974") obligating them to pay contributions to the funds.

Federal jurisdiction is asserted in each case on the basis of §§ 502(e)(1) and 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1132(e)(1) and 1145; and, in Jones's action, on the additional basis of § 301(a) of the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 185(a).

The complaints allege that the defendant employers were and are bound by certain bargaining agreements entered into on their behalf (by an employers' association) with Local 1974; that the agreements by their terms cover all work defined therein as tapers' and pointers' work performed within a certain geographical area (New York City and parts of Nassau County, New York); that the agreements require each employer to pay contributions to the trust funds based upon the number of hours worked by their employees in work covered by the bargaining agreements; that the employers have caused employees to perform

[1] The Court of Appeals' decision refers to petitioners as "plaintiffs" and to respondents as "defendants"; for convenience the same terminology is employed here.

[2] In the first two cases, suit was brought by the Alfarone plaintiffs and Jones moved to intervene. In the third, Jones brought suit and the Alfarone plaintiffs joined as co-plaintiffs.

such work and have thereby become obligated to pay contributions to the funds; that the employers have failed and refused to pay such contributions; and that as a result, moneys are owing the funds by the employers.

The complaints additionally allege (as a second cause of action, against the employer-appointed trustees) that the plaintiffs have duly demanded of the employer-appointed trustees that the latter take action or join in an action with the Alfarone plaintiffs to collect for the funds the contributions due from the employers; that the employer-appointed trustees have failed and refused to do so; and that by reason of such failure and refusal the employer-appointed trustees have breached the fiduciary duties owed by them to the funds.

The district court had before it, in connection with a companion case,[3] copies of the relevant collective bargaining agreements and trust agreements, and these were subsequently before the Court of Appeals as plaintiffs' exhibits.

Except for such documents as were before it in the companion case, however, the district court had no evidence before it.

The bargaining agreements are construction industry prehire agreements and require, by their terms, that each employer pay contributions to the funds on behalf of all his employees who perform covered work within the geographical area covered by the agreement. (See: App. C, 24c)

The trust agreements provide that if the union trustees and the employer trustees deadlock on an issue that comes before them for decision as a body they shall arbitrate it.

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[3] The district court's decision dismissing the complaint in that companion case is reprinted in App. B, 15b-23b. That decision remains non-final and, because of the district court's denial of plaintiffs' motions for certification pursuant to 28 U.S.C. § 1292(b), non-appealable.

The district court dismissed all three complaints. It held that the Alfarone plaintiffs lacked standing to sue to collect the delinquent contributions because they had not arbitrated with the employer-appointed trustees the question whether the latter should join with the former in suing (App. B, 12b, 13b, 14b). It held that Jones had no standing because his claim was not "uniquely personal"; App. B, 11b.

The district court added, as *dicta*, that even if plaintiffs had standing, there were no contributions due. *Ibid.* Its reasoning on this latter point was based upon a misreading of the bargaining agreements (App. B, 21b-22b; App. C, 24c, 30c).[4] Its misreading, however, even if shared by

[4] The bargaining agreement provisions (Art. XXI, Secs. 1, 2, 3, 4 (App. C, 24c-29c))that require employers to contribute to the funds on behalf of employees who perform covered work make no distinction between employees who are, and those who are not, members of the union. Neither do the provisions, elsewhere in the bargaining agreement, that relate to wages, hours and working conditions. Indeed, if an agreement did discriminate in favor of union members in this regard (*e.g.*, by limiting its terms to union-member employees), it would be patently illegal; *cf. Radio Officers' Union v. NLRB*, 347 U.S. 17, 47-48 (1953).

It is thus irrelevant here what union (if any) the employees, or some of them, belonged to so long as they were employed by signatory employers to perform, and did perform, covered work. Similarly irrelevant is whether Local 1974 did or did not enjoy majority status on any particular job, since the bargaining agreements are unrepudiated pre-hire agreements; *cf. Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1975).

The district court overlooked Secs. 1 to 4 of Article XXI (App. C, 24c, 25c, 26c, 29c), and misread another provision, Sec. 7 (App. C, 30c) that deals with contributions earned by locally-based employees working outside the covered geographical area. That provision provides, in order to protect the plan credits of such employees, that such contributions be paid to the locally-based funds rather than to whatever fund exists in the locality where such "out-of-town" work is performed. Since Sec. 7 refers to such locally-based employees as journeymen and apprentices "of Local 1974," however, the district court and, possibly, the

footnote continued on following page)

the Court of Appeals (*see:* App. A, 4a, 5a), is immaterial here. Neither court based, nor could base, its decision upon such misreading.

Plaintiffs duly appealed to the Second Circuit from the dismissals of their complaints. On Appeal, the three cases were consolidated and decided together. The Court of Appeals affirmed the district court's decisions.

The Court of Appeals affirmed dismissal of the suits brought by the union-appointed trustees on the ground that they had not arbitrated with the employer-appointed trustees, before bringing suit, the question whether the latter should join with the former in bringing suit. It added, further, that by suing the union-appointed trustees had violated § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (App. A, 7a-8a), which requires that trust agreements governing employer-contributed funds contain clauses that provide for joint "administration" of the funds and provide that if the union-appointed and employer-appointed groups deadlock "on the administration of such fund," arbitration shall be available. Additionally, the court below reasoned that the result it thus reached, denying the union-appointed trustees' standing to sue to collect contributions until they have arbitrated such preliminary issue, was mandated by what the court termed a "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases." (App. A, 8a)

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footnote continued from preceding page)

Court of Appeals (App. A, 5a) were misled into supposing that the bargaining agreements as a whole cover only members of Local 1974.

Neither court had before it any evidence as to who the employees who performed the work were, to what union (if any) they belonged, or by whom they were directly employed. As a result, no matter what its misreading of the bargaining agreements, neither court below could base its decision upon a determination of what contributions, if any, were due the funds.

Since the courts' decisions below were based on lack of standing, and not upon their misunderstanding of the bargaining agreements, the latter is not material to this petition for certiorari.

The court below also affirmed dismissal of the suit brought by Jones, the participant, and the denial of his motions to intervene as co-plaintiff in the other suits. After noting that Jones was not suing in connection with benefits "uniquely personal" to himself, it held that the refusal of trustees to bring suit to recover delinquent contributions is not a breach of their fiduciary responsibilities; and that therefore, because a participant may sue derivatively only if he establishes that the trustees breached their fiduciary duties, Jones had no standing to sue (App. A, 9a).

Plaintiffs promptly moved the Court of Appeals for rehearing, with a suggestion for rehearing *en banc*. Their motion was denied on May 22, 1986. App. A, 10a.[5]

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[5] After the Court of Appeals' decision, the union-appointed trustees attempted, through the procedures of the American Arbitration Association, to obtain agreement on an impartial aribitrator to resolve the dispute. The employer-appointed trustees refused to participate and commenced a proceeding, in the Supreme Court of the State of New York, County of New York, to enjoin any arbitration of the issue, "on the grounds that no valid agreement exists between the parties requiring arbitration," as well as on the grounds of waiver, estoppel, and *res judicata*. *In the Matter of the Application of Employer Trustees of the Tapers Industry Insurance and Annuity Funds for a Judgment Staying the Arbitration Commenced by Union Appointed Trustees, etc.*, Index No. 15737/86. After the Association wrote them, advising that it would not proceed without their consent but requesting such consent, the employer-appointed trustees withdrew the proceeding but wrote the Association refusing consent to the arbitration.

The union-appointed trustees thereupon commenced a proceeding in federal district court for appointment of an arbitrator; *In the Matter of the Arbitration between Union-Appointed Trustees, etc., and Employer-Appointed Trustees, etc.*, U.S.D.C., S.D.N.Y. M-55. The employer-appointed trustees oppose such proceeding and have asked the court to enjoin the union-appointed trustees from demanding arbitration. The matter remains pending. No possible resolution of it, however, could moot the instant case—for even if an arbitration decision were rendered the date of this petition, directing the employer-appointed trustees to join in suit to collect the delinquent contributions, and such suit were instituted the same day, such suit would be barred by ERISA's six-year statute of limitations from claiming that portion of the contributions that accrued from July 1, 1980, to August 19, 1980.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided, in conflict with decisions of the courts of appeals of other circuits and contrary to Congress' intent as explicated in decisions of this Court, two questions of great importance to the collection under ERISA of delinquent contributions owed by employers to employee-benefit trust funds. Specifically, its decision holds:

(a) that union-appointed trustees of an employee-benefit trust fund are barred from suing to enforce § 515 of ERISA and thus recover delinquent contributions owed the fund without the participation of the employer-appointed trustees as co-plaintiffs, unless the union-appointed trustees have first arbitrated with the employer-appointed trustees the question whether the latter should join them in bringing suit (App. A, 8a); and

(b) that the refusal of trustees of an employee-benefit trust fund to bring suit to collect delinquent contributions is *not* a breach of their fiduciary duty to the fund; so that, consequently, a participant who has unsuccessfully demanded that they bring suit *lacks* standing to sue on behalf of the fund either to recover the contributions or to otherwise remedy the trustees' failure to sue (App. A, 9a).

By each of its holdings, the court below has rendered more difficult the collection of delinquent contributions under ERISA. By its first holding, it has enabled some of the trustees of a fund to block others from suing to collect contributions pending arbitration of a spurious issue between them. By its second holding, it immunized delinquent employer trustees from legal or equitable responsibility for their failure to pay and collect such contributions. In both holdings, the court below undercut the Congressional intent expressed in ERISA.

A. Standing of Union-Appointed Trustees to Sue

As will be pointed out below, the first of the two holdings below is in conflict with decisions of the Third and Ninth Circuits, in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 924, 940 (3d Cir. 1985) and *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984), respectively, which hold that a contractual agreement to arbitrate should not bar or delay suit to enforce a federal statutory right provided by ERISA. It runs counter, also, to the principle, established by this Court in a line of decisions running from *McKinney v. Missouri-Kansas-Texas Co.*, 357 U.S. 265, 269 (1958) and *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 357 (1971) to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 738, 742 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984), that a contract to arbitrate should not bar or delay suit to enforce a statutory right that expresses a public policy concern.

In conflict with *Barrowclough* and *Amaro*, the decision below asserts that a "firmly established federal policy *favoring* exhaustion of administrative remedies in ERISA cases" (*emphasis supplied*) would be violated if union-appointed trustees were permitted to sue without first arbitrating with the employer-appointed trustees the issue whether all should join in bringing suit. App. A, 8a. In fact, that supposedly "firmly established federal policy" has been firmly rejected by the Third and Ninth Circuits in *Barrowclough*, 752 F.2d at 940, and *Amaro*, 724 F.2d at 752, *supra*. And with specific regard to ERISA delinquency collection suits, the "firmly established federal policy" would appear to run counter to this Court's decisions in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 372 (1984) (holding that no presumption of arbitrability, as regards arbitration under collective bargaining agreements, is applicable to ERISA delinquency collection cases) and *Central States Pension Fund v. Central Transport, Inc.*, ____ U.S. ____, 105 S.Ct. 2833, 86 L.Ed.2d 447

(1985) (establishing a fiduciary responsibility under ERISA to collect delinquent contributions promptly).

B. Standing of Participant to Sue.

The second holding below, denying that the trustees' refusal to sue to recover delinquent contributions owing the fund is or may be a breach of fiduciary duty, and thus denying the right of a participant or beneficiary who has unsuccessfully demanded that they recover such contributions to bring suit himself, is in direct conflict with the well-established rule that where trustees wrongfully fail to sue to recover such contributions a beneficiary or participant may do so. The Third Circuit has re-affirmed that rule as a rule of federal common law under §§ 301(a) of the LMRA, in *Nedd v. United Mine Workers,* 556 F.2d 190, 197 (1977).[6] The same circuit has held the rule applicable under ERISA in *Struble v. Brewery Empl. Welfare Trust Fund,* 732 F.2d 328, 337 (1984).

Moreover, the holding below that the trustees' refusal to sue to recover delinquent contributions is *not* a breach of fiduciary duty under ERISA is in direct conflict with this Court's decision in *Central States Pension Fund, supra,* ____ U.S. at ____, 105 S.Ct. at 2841, 86 L.Ed.2d at 459.

C. Congress's Policy

Of greatest concern, however, is the conflict between the two holdings below and Congress's purpose in enacting ERISA.

In §§ 2(a) and (b) of ERISA, 29 U.S.C. §§ 1001(a) and (b), Congress found that employee-benefit plans are "affected with a national public interest" and that the interests of employee-participants and of their beneficiaries

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[6] This Court has cited *Nedd, supra,* with approval, for the proposition, "We have not taken a restrictive view of *who* may sue under § 301 for violations of such contracts"; *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 25, n. 28 (1983).

in such plans should be protected "by providing for . . . ready access to the Federal courts."

Those Congressional findings are plainly applicable to delinquency collection claims. As this Court has noted, "one of the principal congressional concerns motivating the passage of the Act" was "that plans should assure themselves of adequate funding by promptly collecting employer contributions." *Central States Pension Fund v. Central Transport, Inc., supra,* ____ U.S. at ____, 105 S.Ct. at 2845, 86 L.Ed.2d at 464. The dangers of failing to collect such contributions promptly were and are obvious: "[f]or a plan passively to allow an employer to create such unfunded liabilities would jeopardize the participants' and beneficiaries' interests as well as those of all participating employers who properly comply with their obligations." *Ibid.*

Accordingly, by §§ 403(c)(1) and 406(a)(1)(B) of ERISA as originally enacted, 29 U.S.C. §§ 1103(c)(1) and 1106(a)(1)(B), Congress created what this Court has termed "a trustee responsibility for assuring full and prompt collection of contributions owed the plan," thereby placing the trustees under a "fiduciary duty to gain immediate use of trust assets for the benefit of the trust . . . and to avoid unfunded liabilities that might eventually prove uncollectable as a result of insolvencies"; *ibid.*, ____ U.S. at ____, 105 S.Ct. at 2841, 2845, 86 L.Ed.2d at 459, 464. In 1980, finding that delinquency collection was still unduly impeded by procedural complexities, Congress (by enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-394, 94 Stat. 1208, added § 515 to ERISA, 29 U.S.C. § 1145, which requires employers to fulfil their contribution obligations, together with a new ¶ (g)(2) to § 502 of ERISA, 29 U.S.C. §1132(g)(2), which provides for specific additional remedies, including interest, liquidated damages, and mandatory attorneys' fees in any suit brought successfully "by a fiduciary" to enforce § 515.

The holdings below, however, upset Congress's scheme. Those holdings immunize fund trustees from their responsibility to assure prompt collection of contributions; additionally, they obstruct suit by fiduciaries and participants to enforce the contribution requirement. If allowed to stand, those holdings will defeat Congress's purpose of assuring and requiring prompt collection of contributions owed to employee-benefit trust funds.

II.

Congress's scheme, set out carefully in ERISA and in the amendments made to ERISA by MPPAA, is that suit to enforce an employer's statutory contribution obligation (set forth in § 515 of ERISA) may be brought by any fiduciary, or by any several fiduciaries, of an employee-benefit trust fund. Congress sought to "simplify delinquency collection" by eliminating procedural obstacles and preconditions to such suit. *Cf. Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 87 (1982); Senate Comm. on Labor and Human Resources, § 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess. 44 (Comm. Print, Apr. 1980).

By §§ 306(a) of MPPAA, Congress added a new § 515 of ERISA, 29 U.S.C. § 1145, setting forth the employer's statutory obligation to pay to an employee-benefit fund the contributions that he is obligated by the bargaining or trust agreement to pay. Specifically, MPPAA added it *to Title I* of ERISA. Suit to enforce any provision of that Title may be brought "by a participant, beneficiary or fiduciary" of a fund. *See:* § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

Moreover, by § 306(b) of MPPAA, Congress added a new paragraph, (g)(2), to § 502 of ERISA, 29 U.S.C. § 1132(g)(2), which provides that, "[i]n any action under this title *by a fiduciary* for or on behalf of a plan to enforce section 515 in which a judgment in favor of a plan is awarded"

(emphasis supplied), the court shall award interest, liquidated damages, reasonable attorneys' fees, costs and other appropriate relief.

In short, Congress intended that "a fiduciary" should have standing to sue to enforce § 515 and to recover delinquent contributions owed the trust fund. Its intended meaning of the phrase "a fiduciary" plainly encompassed the meaning, "a trustee".[7]

The decision of the Court of Appeals undercuts this Congressional intent by holding that, before one or several (*e.g.*, the union-appointed) trustees may bring suit to enforce § 515 of ERISA, he or they must first submit to an arbitrator, in a proceeding with the remaining trustees, the question whether these latter should join the suit as plaintiffs. Obviously, such a preliminary arbitration proceeding, because it could neither resolve the issue of the employer's duty to make contributions nor relieve trustees of their fiduciary obligation to collect them,[8] would merely serve to long delay the bringing of suit to recover delinquent contributions.

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[7] In §§ 404(a)(1), 405(a) and 406(b)(2) of ERISA, 29 U.S.C. §§ 1104(a)(1), 1105(a) and 1106(b)(2), Congress made imposed various fiduciary obligations upon "a fiduciary," including responsibility for the breaches of "another fiduciary" or "such other fiduciary". In *NLRB v. AMAX Coal Company*, 453 U.S. 322, 332-333 (1981), this Court explained the meaning of those provisions and, in explicating them, substituted (as synonymous) the phrases "a trustee" and "each trustee" for the statutory phrase, "a fiduciary"; and substituted the words "every other trustee" for the statutory phrases, "another fiduciary" and "such other fiduciary".

It is thus clear from this Court's analysis in *Amax, supra,* (as well as from the statute itself) that when Congress provided for suit by "a fiduciary" to enforce the statutory obligations imposed by § 515 of ERISA, its intent was that any trustee of an employee-benefit fund have standing to bring such suit. *Compare:* the decision below, App. A, 7a, n.1.

[8] See: *Struble v. N.J. Brewery Emp. Welfare Trust Fund*, 732 F.2d 325, 334, 335, 338 (3d Cir. 1984): "The fact that the Trustees submitted their dispute to the Umpire would be irrelevant if the dispute itself were the result of a breach of fiduciary duty. . . . The Umpire is not empowered to decide questions of fiduciary breach, so his decision clearly is not directly relevant to our inquiry. . . . Such a breach . . . would render the entire Umpire process irrelevant."

The decision below advances two arguments in its support. One is its suggestion (App. A, 7a-8a) that enforcement of the contractual arbitration provisions as a bar to suit is mandated by § 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B), which directs that trust agreements of employer-contributed funds provide for joint "administration" of the funds and for arbitration where the union-appointed group and the employer-appointed group deadlock "on the administration of such fund." However, the Seventh Circuit has held that a dispute between trustees as to whether they should bring suit to recover delinquent contributions is not a dispute "on the administration of such fund" but, instead, "falls within the category of extraordinary matters not included in the administration of trust funds"—so that one group of trustees may not, under § 302(c)(5), compel the other to arbitrate such a dispute. *Farmer v. Fisher,* 586 F.2d 1226, 1230 (1978), *overruled on another issue, Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 442 (1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364 (1984).[9] In short, § 302(c)(5) was not intended to apply to questions of delinquency collection.

The second argument advanced by the court below is that "a firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases" requires that union-appointed trustees be barred from bringing suit to collect delinquent contributions until they have arbitrated, with the employer-appointed trustees, the question whether the latter should join in bringing suit; App. A, 8a.

The assertion of a "firmly established federal policy" requiring arbitration and, in particular, its application to delinquency collection cases, would appear clearly out of

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[9] As the court pointed out in *Geigle v. Flacke,* 590 F.Supp. 1068, 1070, n. 2 (E.D.N.Y. No. 1984), "the *Prosser's* court explicitly stated that it was 'overruling' *Farmer* only to the extent that case was inconsistent with the holding in *Prosser's* that pension trustees may come into court (to collect allegedly delinquent employer contributions) 'without first getting the union to invoke the machinery of arbitration.'"

harmony with, if not directly in conflict with, this Court's decision in *Schneider Moving & Storage Co. v. Robbins, supra,* 466 U.S. at 372, that no presumption of arbitrability under the collective bargaining agreement is applicable to ERISA delinquency collection suits.

Moreover, the existence of any federal policy favoring exhaustion in ERISA cases has been firmly denied by the Ninth Circuit in *Amaro, supra,* 724 F.2d at 742 and, subsequently, by the Third Circuit in *Barrowclough, supra,* 752 F.2d at 940. Those circuits assert a contrary federal policy, expressly *dis*favoring contractual arbitration requirements where statutory ERISA rights or obligations are concerned. And this Court's decisions in *McKinney, U.S. Bulk Carriers, Alexander, Barrentine* and *McDonald, supra,* suggest that it is this contrary federal policy, asserted by the *Amaro* and *Barrowclough, supra,* that is in reality "firmly established."

Specifically, the Third and Ninth Circuits pointed out in *Amaro* and *Barrowclough, supra,* that statutorily based ERISA claims are within the exclusive jurisdiction of the federal courts, that contractual arbitration proceedings are not appropriate to such claims, and that exhaustion of contractual arbitration procedures is not a precondition to bringing such a claim in federal court. And see: *McLendon v. Continental Group,* 602 F.Supp. 1492, 1505 (D.N.J. 1985); *Lewis v. Merrill, Lynch, Pierce, Fenner & Smith,* 431 F.Supp. 271, 274-278 (E.D. Pa. 1977).

Citing this Court's decisions in *Barrentine v. Arkansas-Best Freight System, Inc.,* and *Alexander v. Gardner-Denver Co., supra,* the Third Circuit remarked in *Barrowclough, supra,* 752 F.2d at 940 that "[t]here is an inherent incompatibility in referring to an arbitrator claims that fall within the exclusive jurisdiction of the federal courts and that arise as part of a comprehensive federal statutory scheme designed to assure protection to those individuals who fall within it." Noting the "complex and evolving body of federal law designed [by Congress in ERISA] to

protect the benefits of the vast number of workers covered by employee benefit plans" (*Ibid.*, 752 F.2d at 940-941), the Third Circuit held (at 941) that Congress's intent "would be frustrated if arbitrators, who are not bound to consider law or precedent in their decisions, and who decide issues primarily on contractual grounds, had a conclusive role in deciding such claims."

The holdings of the Third and Ninth Circuits are in clear harmony with (and plainly supported by) the principle established by this Court in the line of decisions cited *supra: McKinney,* 357 U.S. at 268; *U.S. Bulk Carriers,* 400 U.S. at 357; *Alexander,* 415 U.S. at 357; *Barrentine,* 450 U.S. at 783, 792; *McDonald,* 466 U.S. at 292—in which this Court has held that a federal statutory claim supported by public policy should not be barred, nor should its prosecution in a federal district court be delayed or impeded, by contractual provisions that purport to require arbitration as a precondition to suit.

As this Court remarked in *U.S. Bulk Carriers, supra,* 400 U.S. at 357, "[w]e hesitate to route this claimant through the . . . administrative remedy of the collective agreement and shut the courthouse door on him when Congress . . . has said that it is open to members of his class." Nor should the courthouse door be shut on a claimant, or the claimant be routed through contractual arbitration procedures, merely because the determination of his statutory claims "may necessarily involve interpretation of a collective bargaining agreement"; *McKinney v. Missouri-Kansas-Texas R. Co., supra,* 357 U.S. at 268.

Application of these principles to suits for enforcement of § 515 of ERISA—i.e., to enforcement of the employer's *statutory* obligation to make contributions to an employee-benefit trust fund—is obviously in accordance with and, indeed, is mandated by, the congressional purposes that motivated enactment of ERISA and MPPAA. As noted above (and as repeatedly noted by this Court), one of Congress's principal purposes in enacting ERISA and

MPPAA was to "simplify delinquency collection" and to require that plans assure themelves of adequate funding by *promptly* collecting employer contributions. *Kaiser Steel Corporation v. Mullins, supra,* 455 U.S. 87: *Central States Pension Fund v. Central Transport, Inc., supra,* ____ U.S. at ___, 105 S.Ct. at 2845, 86 L.Ed.2d at 464. The placing of unnecessary procedural obstacles or prerequisites in the path of delinquency collection, by contractual agreement or otherwise, runs counter to that purpose and threatens to defeat the entire federal statutory scheme that Congress designed for the protection of fund participants and their beneficiaries.

It thus follows that the [first] holding of the Court of Appeals in the instant case, denying the right of the union-appointed trustees of an employee-benefit fund to sue for collection of delinquent contributions until they have first arbitrated, with the remaining trustees, the question whether the latter should join in bringing suit, is in sharp conflict with principles established in a long line of decisions of this Court, and with the well-reasoned decisions of two other circuits. It is likewise in conflict with the Congressional purposes underlying ERISA and MPPAA. Contrary to those purposes, the decision below obstructs access to the courts for enforcement of an employer's statutory duty to pay contributions to an employee-benefit fund, and thus defeats Congress's intent.

III.

The Court of Appeals' second holding is that a beneficiary or employee-participant in an employee-benefit trust fund may not sue under either the LMRA or ERISA to remedy the refusal of fund trustees to recover employer contributions due the fund, for the reason that the trustees' refusal to sue to recover such contributions does not constitute breach of their fiduciary obligations. (App. A, 9a).

On this point, the decision of the Court of Appeals is in conflict with the principles laid down by this Court in

Central States Pension Fund v. Central Transport, Inc., supra, and with decisions of the Third Circuit.

In *Central States,* ____ U.S. ____, 105 S. Ct. at 2841, 86 L.Ed.2d at 459, this Court has held that the common law fiduciary obligations of a trustee "to take control of [trust property] without necessary delay" are applicable under ERISA; and that among the specific statutory requirements of ERISA is § 406(a)(1)(B) thereof, 29 U.S.C. § 1106(a)(1)(b) which, the Court observed, "would certainly create a trustee reponsibility for assuring full and prompt collection of contributions owed to the plan." *Central States Pension Fund v. Central Transport, Inc., supra,* ____ U.S. at ____, 105 S.Ct. at 2841, 86 L.Ed.2d at 459 (at notes 13, 16). These obligations establish what the Court referred to in a subsequent discussion, *ibid,* ____ U.S. at ____, 105 S.Ct. at 2845, 86 L.Ed.2d at 464, as "the trustees' fiduciary duty to gain immediate use of trust assets for the benefit of the trust."

In *Nedd v. United States Workers,* 556 F.2d 190, 197 (1977), the Third Circuit stated the established rule succinctly:

> Where the trustee may sue and wrongfully fails to do so, the beneficiary may sue the trustee as well as the party or parties the trustee failed to sue.

That rule is well established at common law: *Cf. Riviera Congress Assoc. v. Yassky,* 18 N.Y.2d 540, 547, 228 N.E.2d 876 (1976) ("It is fundamental to the law of trusts that *cestuis* have the right . . . to sue for the benefit of the trust on a cause of action which belongs to the trust if 'the trustees refuse to perform their duty in that respect' "); G. Bogert & G. Bogert, *Law of Trusts and Trustees,* § 869 (2d Ed. Rev'd 1982); 2 A. Scott, *Law of Trusts,* § 175 (3d ed. 1967).

In *Struble v. N.J. Emp. Welfare Trust Fund,* 732 F.2d 328, 337 (1984), the Third Circuit specifically held this principle applicable to suits brought under ERISA.

That principle has, however, been rejected by the decision below. By affirming dismissal of the Jones's complaint on a Rule 12, Fed.R.Civ.P. motion before any evidence could be submitted as to the employer's obligation to pay contributions, the court below thus denied to plaintiffs in Jones's position any opportunity to prove that the trustees' refusal breaches the latter's fiduciary duty. It leaves employee participants and beneficiaries of an employee-benefit trust fund without any remedy at all for the trustees' refusal to recover delinquent contributions.

In so doing, the decision below is in conflict with the decisions of at least one other circuit and of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 867, 892, 893—August 1985 Term

(Argued: March 10, 1986 Decided: April 14, 1986)

Docket Nos. 85-7899, 85-7901, 85-7997

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY AND ANNUITY FUNDS,

Plaintiffs-Appellants,

—v.—

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS INC.,

Defendants-Appellees.

Before:

KEARSE and CARDAMONE, *Circuit Judges*, and POLLACK, *Senior District Judge.**

Consolidated appeals from orders of the Eastern District of New York, Eugene H. Nickerson, Judge, dismissing, for lack of standing on the part of the plaintiffs, two suits brought by less than a majority of the trustees of employee-benefit plans against the participating employers, and a third suit by an employee participant and beneficiary of the plans, all three suits seeking to recover fringe benefit contributions allegedly owed to the plans.

Affirmed.

HALL & SLOAN, New York, NY (Burton H. Hall, New York, NY, of counsel), *for Appellants*

AVRAM H. SCHREIBER, Esq., New York, NY, *for Appellee, Employer Trustees*

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN, New York, NY (Brian J. Gallagher, New York, NY, of counsel), *for Appellee, Bernie Wolff Construction Corp.*

* Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

RUSKIN, SCHLISSEL, MOSCOU, EVANS & FALTISCHEK, P.C., New York, NY (Richard Guy Leland, Mineola, NY, of counsel), *for Appellee, Component Assembly, Inc.*

ALBANESE, ALBANESE & FIORE, Esq., Garden City, NY, *for Appellees, Nastasi-White, Inc., and Circle Industries Corp.*

POLLACK, *Senior District Judge*:

This litigation involves three actions brought by union-appointed trustees of the Tapers Industry Insurance Fund and the Tapers Industry Annuity Fund (the Funds), and by a participant and beneficiary of the Funds claiming individually and on behalf of others similarly situated, to recover fringe benefit contributions and liquidated damages allegedly due the Funds from employers. Plaintiffs also claim that the employer-appointed co-trustees who have been named as nominal defendants, breached their fiduciary duties by not joining as plaintiffs in the suits.

Jurisdiction is based on the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(1) (1982).

The employers moved to dismiss the suits on the ground that the trust agreements involved require the plaintiffs to submit their complaints to arbitration in the first instance, and on the further ground that nothing was due to the Funds because none of the members of the Union were involved in the work which is the subject of the complaints.

The District Court, Nickerson, J., dismissed the suits on the grounds that the union-appointed trustees lacked standing to sue for recovery of allegedly delinquent contributions without first obtaining an arbitration decision directing the employer-appointed trustees to join them, and that the collective bargaining agreements, requiring payment of fringe benefit contributions, apply only to work performed by members of the Union.

Discussion

I. *Background*

The employer-defendants and the Drywall Tapers and Pointers of Greater New York, Local Union 1974 (the Union), an arm of the construction industry, entered into ongoing collective bargaining agreements within the scope of § 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(f) (1982).

Each agreement covers all work defined therein as "Tapers' and Pointers' work," performed within a specified geographical area (New York City and parts of Nassau County). Each contains a Union shop clause requiring employees who are members of Local 1974 to remain members, and requiring every journeyman or apprentice employed by an employer who is not a member to become a member of Local 1974 by the eighth day of his employment. Each also contains a no-subcontracting clause prohibiting employers from subcontracting any taping, pointing, or other covered work to any journeyman or to any employer not under contract with Local 1974.

In addition, each agreement obligates each employer to pay contributions to the Tapers Industry Insurance and

Annuity Funds in weekly amounts measured by the wages of each employee who is a member of Local 1974 equal to 32% of the hourly wages received from the employer.

Each Fund is governed by six trustees, three appointed by the Union (Local 1974), and three by or on behalf of the employer-defendants. The trust agreements and the Taft-Hartley Act, 29 U.S.C. § 186(c)(5)-(8), require equal representation in the administration of the Funds, i.e., the operation and administration of the Funds is the joint responsibility of the Union-appointed and of the employer-appointed trustees (Art. III Trust Agreements).

The complaints set forth claims based on alleged delinquency in making payments to Local 1974 of the allegedly required contributions. Plaintiffs claim that the employers-defendants employed plasterers, members of Local 530 of the Operative Plasters and Cement Masons International Association to perform work which, pursuant to the collective bargaining agreements with Local 1974, should have been performed by its members and that because the work performed "belonged" to Local 1974, the employers-defendants were obligated to make contributions to the Funds, as if Local 1974 members had been employed.

No claim is made by plaintiffs that Local 1974 members have performed work for which benefit contributions are due; nor do they claim that the employers have hired non-union workers. The core claim is that the kind of taping work done for the employers by Local 530 belonged to Local 1974. The employers' position is that they employed subcontractors, whose employees were members of Local 530, to perform such taping work in accord with an allocation of work made for the unions respectively by the 1978 Hearings Panel Decision. The

long-standing jurisidictional dispute between the two unions as to their respective spheres of drywall work was decided in *Drywall Tapers & Pointers v. Operative Plasterers' Association*, 601 F.2d 675 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

II. *Trustees' Suits*

The trustees of the Funds are evenly divided on whether there is any delinquency in contributions due Local 1974 and whether suit against the employers is justified; the three employer-appointed trustees have refused to authorize these suits. The trust agreements provide for arbitration in the event of such deadlock. However, the Union-appointed trustees failed to pursue this administrative remedy before bringing these actions.

The trust agreements provide that the trustees may take any action necessary to enforce payment of the contributions due thereunder including, but not limited to, proceedings at law and in equity. However, the agreements specify that "all action by the Trustees shall be by majority decision." Moreover, in the event of a deadlock, the trustees must submit any dispute to arbitration.

The trust clauses prescribing majority action by the trustees as to all aspects of the agreements read:

> Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in status quo pending arbitration as set forth in Article VIII hereof.

The arbitration section reads:

> In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then and in either of such events the Trustees shall attempt to select an impartial arbitrator to hear and determine the matter, issue or dispute. . . .

These trust provisions are mandated by the Labor Management Relations Act (LMRA) § 302(c)(5) as a condition of the existence of all union pension and benefit funds. 29 U.S.C. § 186(c)(5). The purpose of equal representation provisions such as these is to prevent misuse of funds by labor officials who would otherwise have sole control of contributions by the employers. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981); *Rosenthal v. Ann Service Corp.*, 571 F. Supp. 1229, 1232 (S.D.N.Y. 1983).

Plaintiffs' filing of this suit without either receiving the approval of a majority of the trustees or employing the arbitration procedure contravenes both the Taft-Hartley Act and the trust agreements. 29 U.S.C. § 186(c)(5); *see Rosenthal*, 571 F. Supp. at 1232.

Plaintiffs contend that the Union-appointed trustees are fiduciaries of the plans and thus have standing to sue as fiduciaries under ERISA § 502[1], without first comply-

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1 It is questionable whether the Union trustees are even fiduciaries under ERISA. A person is only a fiduciary for purposes of ERISA to the extent that he exercises discretionary control over the administration of a plan. 29 U.S.C. § 1002 (21) (A); *see Thornton v. Evans*, 692 F.2d 1064, 1077 (7th Cir. 1982). The trust agreements, in this case, reserve discretionary power to sue to a majority of the trustees.

ing with the requirements of administration of the funds by a majority of the trustees and of resolution of any dispute by arbitration.

The limitation in the trust agreements on the powers and duties of less than a majority of the trustees under the instant plans is consistent with the power granted fiduciaries to bring a civil suit under ERISA. ERISA expressly requires that the acts of trustees be in accordance with the trust agreements, 29 U.S.C. § 1104(a)(1), and expressly contemplates joint administration of trust funds. 29 U.S.C. § 1102(a)(1). ERISA does not abrogate the equal representation mandates of the Taft-Hartley Act. 29 U.S.C. § 1144(d).

The plans involved in these suits have expressly provided a remedy for deadlock among the trustees on the question whether to sue under the trust agreements for contributions. Before pursuing judicial remedies, the trustees must comply with the arbitration procedures. *See O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 168 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1181 (1985). Permitting the Union-appointed trustees to sue without first submitting the issue to arbitration would violate the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases. *See Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983). Because the trustees have not exhausted their administrative remedies, their actions are premature and were properly dismissed.

III. *Beneficiary's Suits*

The third suit involved in these appeals, brought by Jones, a member of Local 1974 suing individually and on

behalf of others similarly situated, was also properly dismissed. ERISA empowers individual beneficiaries to bring civil actions to recover benefits due them or to enforce personal rights, 29 U.S.C. § 1132(a)(1)(B), or to seek injunctive or other equitable relief. *Id.* § 1132(a)(3). Jones does not seek to recover benefits due him under the plan, nor the benefits of those for whom he purports to sue; he does not assert a personal claim to enforce uniquely personal rights. *See Thornton v. Evans*, 692 F.2d at 1079 n.35; *Rosenthal*, 571 F. Supp. at 1233. In addition, Jones does not assert a claim for injunctive or other equitable relief. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 337-38 (3rd Cir. 1984). Thus, he has no standing to bring this action.

Finally, as to Jones' derivative action on behalf of the Funds, such an action can only be brought if the plaintiff first establishes that the trustees breached their fiduciary duty. *See Struble* 732 F.2d at 336. Jones has failed to establish that the employer-appointed trustees breached their fiduciary duty; their refusal to file a suit to recover contributions allegedly due does not constitute such a breach. *See Ironworkers Local No. 272 v. Bowen*, 695 F.2d 531 (11th Cir. 1983).

Accordingly, the decision below is

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 85-7899, 85-7901, 85-7997

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of May one thousand nine hundred and eighty-six.

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Plaintiffs-Appellants,

v.

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, John Alfarone, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

ELAINE B. GOLDSMITH
CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
84 C 4028

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund,

Plaintiffs,

against

BERNIE WOLFF CONSTRUCTION CORP. and EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

This is one of a series of cases such as *Alfarone et al. v. Nastasi-White, Inc.*, CV 84-3181, brought in this court for similar relief.

Plaintiffs have made a motion to realign parties. Daniel Jones has moved to intervene. For reasons stated in the memorandum and order dated May 20, 1985 in the *Nastasi-White, Inc.* case, the plaintiff trustees have no standing.

Jones has no standing under the Employment Retirement Income Security Act, 29 U.S.C. §1132(e). He asserts not a personal claim but a claim of the entire bargaining unit.

Jones has no standing under the Labor-Management Relations Act, 29 U.S.C. §185(a). This is not a case of an employee's uniquely personal claim, which in any event would be subject to arbitration under the collective bargaining agreement. He does not allege that he worked for the defendant construction company and was not paid a pension contribution.

Appendix B

The court infers from the records in the previous cases which concern the jurisdictional dispute between two unions and from the allegations in the papers of plaintiffs and Jones that no "wages" were paid by the defendant construction company to Local 1974 members. If that inference is correct, there are as yet no contributions due the fund.

The motions of plaintiffs and of Jones are denied.

The court on its own motion dismisses the complaint.

So ordered.

Dated: Brooklyn, New York
October 16, 1985

/s/ Eugene H. Nickerson

EUGENE H. NICKERSON, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
84 C 4029

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund,

Plaintiffs,

against

COMPONENT ASSEMBLY, INC., and EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

This case is governed by this court's memorandum and order dated May 30, 1983 in *Alfarone et al. v. Nastasi-White, Inc., et al.*, CV 84-3181.

Plaintiffs have no standing. Nor does the proposed intervenor.

Even if plaintiffs or the prospective intervenor had standing they have no present claim for contributions for the reasons stated in the above case. The court declines to certify any question for review.

Plaintiffs' motions are denied. Defendants' motion to dismiss are granted. The complaint is dismissed. So ordered.

Dated: Brooklyn, New York
October 16, 1985

/s/ Eugene H. Nickerson

EUGENE H. NICKERSON, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

85 C 2908

DANIEL JONES, individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION-APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Plaintiffs,

against

NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS, INC. and EMPLOYER-APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

This case is governed by this court's memorandum and order dated May 30, 1983 in *Alfarone, et al v. Nastasi-White, Inc., et al.*, CV 84-3181.

Plaintiffs have no standing. Even if they had, they have no present claim for contributions for the reasons stated in the above case. Defendants' motion to dismiss is granted. Defendants' motion for attorneys' fees, costs and sanctions against plaintiffs is denied. So ordered.

Dated: Brooklyn, New York
October 23, 1985

/s/ Eugene H. Nickerson

EUGENE H. NICKERSON, U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
84 C 3181

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund,

Plaintiffs,

against

NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY CONTRACTING, INC., and
EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Defendants.

NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY CONTRACTING, INC.,

Counterclaim-Plaintiffs,

against

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund;

TAPERS INDUSTRY INSURANCE FUND;

TAPERS INDUSTRY ANNUITY FUND;

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974, OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO;

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO;

LOCAL 530 OF THE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO;

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO;

Appendix B

BUILDING TRADES EMPLOYERS' ASSOCIATION;

METROPOLITAN NEW YORK DRY WALL CONTRACTORS ASSOCIATION, INC.,

BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREATER NEW YORK AND VICINITY, AFL-CIO;

NEW YORK PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES;

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO; and

JOINT ADMINISTRATIVE COMMITTEE OF THE PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY,

Counterclaim-Defendants.

[Names of Counsel Omitted]

NICKERSON, District Judge

Plaintiffs, the union-appointed trustees of the Tapers Industry Insurance Fund and the Tapers Industry Annuity Fund (the Funds), brought this action to obtain contributions and liquidated damages allegedly due the Funds by defendants Nastasi-White, Inc. and its subsidiaries Circle Industries Corp, and Quick-Way Contracting, Inc. (the employer defendants). Plaintiffs also claim that the employer-appointed Trustees (the employer trustees) breached their fiduciary duties by not joining in the suit. *See* 29 U.S.C. §1104. Jurisdiction is based on the Employment Retirement Income Security Program (ERISA), 29 USC §1132 (e)(1).

Plaintiffs allege that the Funds are employee benefit welfare plans established pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5)(B). In July of 1980 Metropolitan New York Dry Wall Contractors' Association, Inc.

(Metropolitan) acting as defendant Nastasi's agent, entered into a collective bargaining agreement with Drywall Tapers and Pointers of Greater New York Local 1974 (Local 1974). In July 1980 Circle also entered into a collective bargaining agreement with Local 1974. The agreements remained in force until July 31, 1983. In July 1983 Metropolitan and Local 1974 entered into a new collective bargaining agreement extending the 1980 agreement with modification to July 31, 1986.

Pursuant to the collective bargaining agreements Metropolitan and Local 1974 also entered into two trust agreements establishing the Funds to provide benefits for "employees" who were members of Local 1974. The agreements are identical for present purposes. Pursuant to the trust agreements each Fund is governed by six trustees, three appointed by Local 1974 and three by Metropolitan.

Plaintiffs bring suit against the employer defendants under 29 U.S.C. §1145 of ERISA, which provides:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Plaintiffs allege that the agreements obligate the employer defendants to make contributions to the Funds on a weekly basis equal to 32% of the hourly wage rate multiplied by the number of hours of work performed by the "employees." Plaintiffs claim that employer defendants should have employed Local 1974 members but instead employed members of another union, Local 530 of the Plasterers and Cement Masons International Association (Local 530), and that the employer defendants are now obligated nonetheless to make contributions as if Local 1974 members had been employed.

Appendix B

The employer defendants argue as an affirmative defense that the participants in the Funds were not "employees" and thus are not entitled to contributions. The employer defendants claim that they hired as employees members of Local 530 and not members of Local 1974 to perform the pointing and taping work for which contributions are allegedly due. In their counterclaims the employer defendants also seek to have the court set aside its previous decisions, familiarity with all of which is assumed, granting Local 1974 a permanent injunction enjoining Local 530 from asserting jurisdiction over certain jobsites. *See Drywall Tapers v. Local 530,* No. 81-337 (E.D.N.Y. Feb. 2, 1984).

Numerous motions have been made. The employer defendants move (1) to dismiss for lack of standing and (2) to stay discovery until 60 days after the dispute is referred to the Joint Administrative Committee of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Joint Committee); (3) the plaintiffs, the Funds and Local 1974 move to dismiss the employer defendants' and Local 530's counterclaims and crossclaims; (4) the plaintiffs and Local 1974 move to enjoin the Joint Committee from threatening to take any action in regard to this dispute; (5) the Joint Committee and the Building and Construction Trades Department, AFL-CIO (the Building Department) move to extend their time to answer the counterclaims; and (6) the Operative Plasterers and Cement Masons International Association move to amend its answer to assert crossclaims and counterclaims.

I

The court first considers the motion of the employer defendants to dismiss the complaint on the ground that without a majority of the trustees acting as plaintiffs there is no standing.

Appendix B

The trust agreements establishing the Funds and the Taft-Hartley Act, 29 U.S.C. §186(c)(5)-(8), require equal representation in the administration of the Funds. The trust agreements state in pertinent part:

ARTICLE III TRUSTEES

Section 1. *Number.* The operation and administration of the... [Funds] shall be the joint responsibility of three Trustees appointed by [Metropolitan] and three Trustees appointed by the Union.

ARTICLE V CONTRIBUTIONS TO THE FUND

SECTION 4. *Default in Payment.* . . The trustees may take any action necessary to enforce payment of the contributions due hereunder, including, but not limited to, proceedings at law and in equity.

ARTICLE VII MEETING AND DECISIONS OF TRUSTEES

Section 5. *Majority Vote of Trustees.* All action by the Trustees shall be by majority decision. Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in *status quo* pending arbitration as set forth in Article VIII hereof.

ARTICLE VIII ARBITRATION

Section 1. *Application of this Article.* In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then and in either of such events the Trustees shall attempt to select an impartial arbitrator to hear and determine the matter, issue or dispute. . . .

Appendix B

> Section 3. *Awards.* The decision or award of the arbitrator shall be in writing and shall be final and binding on all parties and persons concerned. . . .

The Taft-Hartley Act allows employers to make contribution to funds provided that "employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon. . . . '" 29 U.S.C. §186(c)(5). The purpose of the equal representation provision is to prevent misuse of funds by labor officials who would otherwise have sole control of money contributed by the employer. *See National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981); *Rosenthal v. Ann Service Corp.*, 571 F.Supp. 1229, 1232 (S.D.N.Y. 1983).

Both the trust agreements and the Taft-Hartley Act make it clear that plaintiffs alone cannot maintain the suit, whether unanimity or a simple majority of the trustees is required. *See Rosenthal, supra,* 571 F. Supp. at 1232 & n.7. *See also* Bogert, *Trusts and Trustees,* §554 (2d ed. 1980).

Plaintiffs argue that bringing suit to collect contributions is not part of the "administration" of the Funds and thus is not subject to the equal representation provision. The Court of Appeals for the Second Circuit has interpreted "administration" to include all issues which the trustees have the power to decide under the trust agreement. *Barrett v. Miller,* 276 F.2d 429 (2d Cir. 1960); *Mahoney v. Fisher,* 277 F.2d 5 (2d Cir. 1960). The agreements grant the trustees power to proceed "at law and equity" to enforce payment of contributions. Art. V, Sec. 4.

Even if the decision to sue an amployer for unpaid contributions is not usually considered to be part of the "administration" of the Funds within the meaning of Section 186(c)(5) of the Taft-Hartley Act, the trust agreement enlarges the scope of the trustees' administrative duties. *See Struble v. New Jersey Brewery Employers' Welfare*

Trust Fund, 732 F.2d 325, 335 (3d Cir. 1984) and case cited.

Plaintiffs rely on dicta in the *Rosenthal* case, *supra,* 571 F.Supp. at 1232, suggesting that a single trustee may sue an employer so long as the co-trustees are named as defendants or formal demand to join in the suit is made upon all trustees. Plaintiffs have named the employer trustees as defendants, but the record does not indicate that they have been served. Plaintiffs also allege that they requested the employer trustees to join the suit, but do not state precisely when and in what manner the request was made.

Even assuming a formal request was made or the employer trustees were served, the trust agreements require the plaintiffs to make a formal demand on the employer trustees and then after a deadlock to seek the appointment of an arbitrator. *Cf. Schneider Moving & Storage Co. v. Robbins,* 104 S.Ct. 1844 (2d Cir. 1984); *O'Hare v. General Marine Transport Corp.,* 740 F.2d 160, 168 (2d Cir. 1984); *Singleton v. Abramson,* 336 F.Supp. 754, 757 (S.D.N.Y. 1971). The *Rosenthal* opinion did not discuss whether the trust agreement, as here, required an impartial arbitrator to be appointed in the case of a deadlock.

Even if plaintiffs had standing, the court finds that they have no present claim for contributions. The employer defendants did not hire members of Local 1974 as "employees" to do the pointing and taping work. Local 1974 and its members may have a damage claim for lost wages against the employer defendants. But the Trustees constitute a legal entity from the union or its members. Their obligation is to receive and administer the contributions made pursuant to the collective bargaining agreements between local 1974 and the defendant employers.

Those collective bargaining agreements contemplate as a prerequisite to paying contributions to the Funds that the "employees" covered by the agreements in fact be

entitled to "wages." Section 7 of the collective bargaining agreements for the years 1980-83 and 1983-86 provides:

> (a) The Employers shall pay the percentage contributions on the gross *wages* and the annuities for all Journeymen and Registered Apprentices of Local Union 1974 *employed* in any part of the United States. (Emphasis added).

Here the members of Local 1974 were not "employees" and have as yet been paid no "wages" for the period in question.

The Court need not decide whether, if Local 1974 or its members were successful in a suit for damages for lost wages, the lost contributions would be an added element of damages payable to the individual members of Local 1974 or amounts which the plaintiffs could collect on the theory that the damages obtained for loss of wages constituted in themselves "wages." It is enough that there are yet no "wages" "on" which the contributions are payable.

The employer defendants' motion to dismiss for lack of standing is granted.

II

The employer defendants and Local 530 assert counterclaims and crossclaims seeking a declaratory judgment that the court's decision in *Drywall Tapers, supra,* enjoining Local 530 from asserting jurisdiction over the taping and pointing work at certain jobsites is no longer valid. Plaintiffs move to dismiss the counterclaims and crossclaims on the ground that the claims are *res judicata.*

The employer defendants and Local 530 claim that they are not merely relitigating the *Drywall Tapers* case, but asserting new developments since the court's decision which justify relief from judgment. Whether or not such relief is warranted and whether the employer defendants have standing to make such a claim, *see O'Hare, supra,* 740 F.2d at 172, the court need not now decide the issue.

Appendix B

Local 530 has made the identical motion in the *Drywall Tapers* action and the matter is more appropriately decided as part of that case.

III

The court need not consider the other contentions advanced by the parties.

The employer defendants' motion to dismiss is granted. the employer defendants' and Local 530's counterclaims and crossclaims are dismissed without prejudice to the assertion of their claims in the *Drywall Tapers* case. So ordered.

Dated: Brooklyn, New York
May 30, 1985

/s/ Eugene Nickerson

EUGENE NICKERSON, U.S.D.J.

APPENDIX C

TRADE AGREEMENT

between

Drywall Tapers and Pointers of Greater New York Local union 1974, affiliated with International Brotherhood of Painters and Allied Trades, AFL-CIO

and

Metropolitan New York Dry Wall Contractors Association, Inc.

* * *

ART. XXI, SECTION 1. FRINGE BENEFIT FUNDS. The parties agree that, in addition to the wages to be paid as elsewhere provided in this Agreement, each Employer (whether a member of the Association or not) shall, commencing with the effective date of this Agreement and for the duration thereof, at the close of each weekly pay period, make contributions for such pay period to certain fringe benefit funds on behalf of each employee employed by such Employer and covered by this Agreement, as hereinbelow set forth.

(a) Each such Employer shall pay to the Trustees of the Tapers Insurance Fund, designated under the Agreement and Declaration of Trust dated November 30, 1971, as amended, the terms and provisions of which Agreement and Declaration of Trust are specifically incorporated herein by reference, at the close of each weekly pay period, sums of money equal to the number of hours actually worked, multiplied by the rate of wages per hour of each such employer, as follows: for all pay periods or portions thereof during the periods August 1, 1983 until the expiration of this Agreement, such sums of money shall be equal to 22% of the hourly rate of each such employee, multiplied by the actual weekly hours worked. For each hour or

portion thereof for which an employee actually worked, the Employer shall make a contribution of 46¢ per hour for the Tapers Industry Pension Fund to the trustees of the Tapers Industry Insurance Fund. The sums so paid to the Trustees of the Tapers Insurance Fund shall be applied by the said Trustees as provided in Sections 2 and 3 hereinbelow.

(b) Each such employer shall pay to the Trustees of the Taper Industry Annuity Fund, designated under an Agreement and Declaration of Trust dated October 9, 1972, as amended, the terms and provisions of which Agreement and Declaration of Trust are specifically incorporated herein by reference, at the close of each weekly pay period, sums of money equal to 10% of the hourly rate of each employee, multiplied by the hours actually worked.

(c) Each such employer shall pay to the Trustees of the Local 1974 Taper Apprenticeship and Training Trust, designated under an Agreement and Declaration of Trust dated July 24, 1972, as amended, the terms and provisions of which Agreement and Declaration of Trust are specifically incorporated herein by reference, at the close of each weekly pay period, sums of money equal to one cent (1¢) per hour of employment of each such employee.

(d) Before each payday, each Employer shall deliver to the Tapers Insurance Fund a payrloll report and pay all contributions due for the pay period to the funds. Upon the establishment of a prepayment stamp system, each Employer shall make contributions in accordance therewith. This shall be implemented six (6) months after the date of contract signing.

(e) The union agrees to advise the Employers as to the amounts of contributions payable on a cents-per-hour basis.

Appendix C

SECTION 2. TAPERS INDUSTRY PENSION FUND. The only agreement between the parties to this Agreement regarding pensions or retirement for employees covered by this Agreement is as follows:

1. (a) Commencing with the first day of August 1971 and for the duration of this Agreement and any renewals or extensions thereof, each Employer, whether a member of the Association or otherwise signatory hereto, agrees to make payments to the Tapers Industry Pension Fund for each employee covered by this Agreement as follows:

(b) For each hour or portion thereof for which an employee receives pay, the Employer shall make a contribution of 71¢ to the above-named Pension Fund, as provided in Section 1 of this Article. This 71¢ per hour is derived as follows: 25¢ from the 22% fringe benefits, plus an additional 46¢ per hour contribution from the employer.

(c) For the purpose of this Article, each hour paid for, including hours attributable to show up time, and other hours for which pay is received by the employee in accordance with this Agreement, shall be counted as hours for which contributions are payable.

(d) Contributions shall be paid on behalf of any employee starting with the employer's first day of employment in a job classification covered by this Agreement. This inncludes, but is not limited to, apprentices, helpers, trainees, and probationary employees.

(e) The payments to the Pension Fund required above shall be made to the "Tapers Industry

Pension Fund," which was established under an Agreement and Declaration of Trust dated . The Employer hereby agrees to be bound by and to the said Agreement and Declaration of Trust, as though he had actually signed the same.

2. Each employer, whether a member of the Association or otherwise signatory hereto, hereby irrevocably designates as its representatives on the Board of Trustees such Trustees as are now serving, or who will in the future serve, as Employer Trustees, together with their successors. Each Employer further agrees to be bound by all actions taken by the Trustees pursuant to the said Agreement and Declaration of Trust.

3. All contributions shall be made at such time and in such manner as the Trustees require; and the Trustees shall have the authority to have an independent Certified Public Accountant audit the payroll and wage records of the Employer for the purpose of determining the accuracy of contributions to the Pension Fund.

4. If an Employer fails to make contributions to the Pension Fund within twenty days from the date required by the Trustees, the Union shall have the right to take whatever steps are necessary to secure compliance with this Agreement, any other provision hereof to the contrary notwithstanding, and the Employer shall be liable for all costs for collection of the payments due together with attorneys' fees and such penalties as may be assessed by the Trustees. The Employer's liability for payment under this Article shall not be subject to or covered by any grievance or arbitration procedure or any "no-strike" clause which may be provided or set forth elsewhere in this Agreement.

5. The Pension Plan adopted by the Trustees of said Pension Fund shall at all times conform with the requirements of the Internal Revenue Code so as to enable the

Employer at all times to treat contributions to the Pension Fund as a deduction for income tax purposes.

SECTION 3. The sums received by the Trustees of the Tapers Insurance Fund pursuant to paragraph (a) of Section 1 of this Article and remaining after the deduction provided for in Section 2 of the Article shall be administered and expended by the Trustees of the said Tapers Insurance Fund pursuant to the Agreement and Declaration of Trust dated the 30th of November, 1971, as amended, for the purposes of:

(i) providing such amounts of life, accident and health insurance, hospitalization insurance, dental care and optical care for Journeyman and Registered Apprentice Employers, their wives and children under 19 years of age, as the Trustees may determine, to pay or provide for similar benefits for the Employees of Local union 1974 of New York City, the Joint Board, and Employees of this Trust and the dependants of such Employees as the Trustees may determine;

(ii) paying or providing for the payment of such old age pensions for Journeymen and Registered Apprentices employed by contributing Employers or serving as elected Officers of Local Union 1974 of New York City or as Employees of the Joint Board as the Trustees may determine. The Trustees are hereby empowered to pay or provide for the payment of old age pension benefits for all Employees of Local Union 1974 of New York City, not otherwise eligible for old age pension benefits under any collective bargaining agreement on the same basis as for Registered Apprentices and Journeymen;

(iii) setting aside from the sums received pursuant to paragraph (a) of Section 1 of this Article on behalf of each Journeyman Apprentice and maintaining as a vacation fund, in a separate and individual account on behalf of such Journeyman or Apprentice sums as follows: out of

all such sums so received based upon pay periods or portions thereof within the period July 1, 1980 to the expiration of this Agreement, sums equal to nine percent (9%) of the actual hours worked multiplied by the rate of wages per hour. The said vacation fund so maintained on behalf of each Journeyman or Apprentice shall be paid to such Journeyman or Apprentice by the said Trustees no less often than once a year.

SECTION 4. TAPER INDUSTRY ANNUITY FUND. The parties have established a Taper Industry Annuity Fund, to make annuities and certain other benefits, including supplemental unemployment benefits, available to Journeymen and Apprentices. Each Employer shall contribute to the Trustees of the Taper Industry Annuity Fund so established at the close of each weekly pay period sums of money equal to 10% of the gross wages payable to each Journeyman or Apprentice.

SECTION 5. "Gross wages" and "gross wages payable" as used this Agreement and in the Trust Agreement referred to in this Article shall mean and include whichever of the two following bases of the percentage contributions may be the greater: (1) the actual total gross earnings of any Employer's Journeymen and Registered Apprentices, or (2) a gross estimated wage figure, subject to readjustment as hereinafter provided, equivalent to three times the Employer's cost of all materials used by him during his fiscal accounting period, as finally computed and assessed at the close thereof.

SECTION 6. The parties agree to execute an agreement based upon the Model Collective Bargaining Clause for Participation in the National Painting and Decorating and Drywall Apprenticeship and Manpower Training Fund, revised and approved by The National Apprenticeship Committee, November 4, 1970 (Preferred clause where-

by funds for the National are channeled through local fund), which agreement shall provide for contributions from each Employer for each of his employees to an Apprenticeship Fund to be established in the sum of 1¢ for each hour or portion thereof for which an employee covered under this agreement receives pay.

SECTION 7. ENFORCEMENT. (a) The Employers shall pay the percentage contributions on the gross wages and the annuities for all Journeymen and Registered Apprentices of Local Union 1974 employed in any part of the United States.

(b) In the event that State or Federal legislation shall be enacted requiring the Employer, during the term of this Trade Agreement, to pay premiums or taxes, measured by the wages of their Journeyman and Registered Apprentices covered by this Agreement for any of the Social Insurance benefits herein provided for, the parties hereto shall, promptly after the enactment of such legislation and within ten (10) days notice after service of written notice by the Association on the Union, commence negotiations in respect to the reduction or elimination of that portion of Employer contributions required by this Agreement as is applied to the purchase of such social insurance benefits which may be provided by the Employer payment of premiums or taxes under such State or Federal legislation; and in the event that the parties fail within thirty (30) days after the commencement of negotiations to arrive at an agreement, the matter shall be determined by an Umpire designated by the American Arbitration Association, the decision of such Umpire to be final and binding on the parties.

(c) The percentage and annuity contributions hereinabove provided for constitute a consideration for the making of this Agreement and are of its very essence. Failure by any Employer to pay the amounts due from

him to the Trustees shall be deemed a breach of this Agreement, and in such event the Union may take such steps as it deems necessary to enforce the foregoing and following provisions relating to payment to the Trustees. In the event that an Employer fails to make the required payments for more than two (2) weeks the Union may order his Journeymen and Registered Apprentices to cease work until the payment has been made. Such Employer shall pay all such Journeymen and Registered Apprentices for all time lost, not to exceed one (1) week's wages per man.

(d) Any Employer required by this Article to pay the percentage contributions of the gross wages payable and the annuities to his Journeymen and Registered Apprentices or on their behalf for the payroll period immediately preceding, who fails to pay such percentage contributions within one week of the date prescribed for their payment shall pay to the Trustees as liquidated damages the sum of 10% of the required percentage contributions in addition to the required contributions. If any Employer during any calendar year has failed to pay such contributions with the prescribed date for more than a total of five (5) weeks and not more than ten (10) weeks, the penalty for such delinquency shall be twenty percent (20%) of the required percentage contributions. If the total is more than ten (10) weeks the penalty shall be thirty percent (30%). Any Employer who has been delinquent a total of more than ten (10) weeks is deemed to have been guilty of having violated the payment of wages clause and is subject to all penalties implicit in such violation.

Any Employer who fails to comply with the preceding paragarph shall be cited to appear before the Joint Board which may, on a finding, in its discretion, impose such penalties and/or liquidated damages as it deems appropriate, aside from and in addition to the liquidated damages provided for above.

Appendix C

It is agreed that the Employers will be bound in all respects by the rules and/or regulations established or to be established by the Trustees relating to Employer contributions to the Trust Fund, including rules for resolving any disputes concerning Employer payments or reports to the Trustees.

Should any Employer, after an audit, be held subject to a final assessment on the estimated wage figure as the greater base on which his contribution is to be made, he shall be entitled on request to a hearing before the Trustees and an opportunity fully to present all available facts, and be subject to open examination thereon, which may establish his actual lower direct labor costs in the circumstances of his particular operations, which would warrant a readjustment of the base of his contributions from the estimated wage figure to his actual total gross earnings figure, as it may appear to the Trustees. If his rights to any such readjustment is proven satisfactorily, the Trustees shall remit the assessment of the excess contributions over the percentage contributions of his actual direct labor costs so found. The decision of the Trustees, after such hearing, shall be binding upon the Employer, unless within ten (10) days after receiving notice of such decision in writing the Employer shall appeal to the Joint Board. In the event of such appeal, the decision of the Joint Board shall be final and binding on all parties. If, after an audit, and a final assessment of further contributions due, the Employer fails, within ten (10) days after written notice thereof given by the Trustees, to request in writing a hearing before them as provided above to protest the assessment and to seek a readjustment of his base of contributions, the Employer shall be deemed conclusively to have consent thereto, with no further recourse.

As a condition to any appeal from a fine or from an audit report, the Employer shall post security in the sum of the

full amount of the fine or of the contributions determined by the audit report to be due.

All delinquencies in fund contributions, in Joint Board Fees, and in fines and assessments levied by the Joint Board must be paid up by any Employer before signing any agreement with the Union.

Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

vs.

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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Garden City, New York
17 September 1986

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In the Supreme Court of the
United States
October Term, 1986

NO. 86-264

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

against

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

Brief In Opposition

Respondents, Nastasi-White, Inc. ("Nastasi") and Circle Industries Corp. ("Circle") respectfully request this Court to deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 14, 1986 affirming the judgment of the United States District Court for the Eastern District of New York dismissing the complaint as against these respondents. The opinion of the United States Court of Appeals and the United States District Court for the Eastern District of New York are annexed to the petition at Appendix pages 1a through 9a and 14b respectively.

Questions Presented

1. May less than a majority of the trustees of an employee benefit plan sue to recover fringe benefit contributions allegedly owed by employers when the agreement and declaration of trust establishing the fund requires that the decision whether to sue, in the absence of a majority vote by the trustees, be submitted to arbitration; and there has been no request for arbitration of the deadlock?

2. Does a participant in an employee benefit plan have standing to sue an employer for the alleged failure to contribute to the plan, when the trustees of the plan have not determined by a majority vote to bring such an action, no demand for arbitration of the deadlock has been made, and no fiduciary breach has been committed by the trustees?

3. May a participant in an employee benefit plan sue an employer under Section 502 of ERISA for alleged unpaid contributions when no wages upon which such contributions must be based were earned by members of the union who participate in the funds, the work was performed by members of another union, contributions based upon wages paid were made by the employer to the funds of that union, and there has been no determination that the work was not properly assigned?

STATEMENT OF THE CASE

Nature of the Case

This action represents the latest of several attempts by plaintiffs to pursue resolution of an ongoing jurisdictional dispute between two unions under the guise of an ERISA suit. The two unions are The Operative Plasterers and Cement Masons International Association, Local 530 ("Local 530"), and the Drywall Tapers and Pointers of Greater New York, Local 1974 ("Local 1974"). Although these disputes were apparently put to rest by the 1978 Hearings Panel Decision and the judicial determination in Drywall Tapers and Pointers of Greater New York, Local 1974 v. Operative Plasters' & Cement Masons' International Association, 601 F.2d 675 (2d Cir. 1979) cert. denied 444 U.S. 1073 (1980), the dispute continues to fester and this action was thus brought clothed in the garb of ERISA litigation.

The Course of the Proceedings and the Disposition in the Courts Below

This is one of three separate but similar complaints filed by petitioners which were dismissed by the District Court and reviewed and affirmed by the Circuit Court in one opinion. The complaint against respondents Nastasi-White and Circle Industries was essentially for the same cause in the complaint filed against them by the union appointed trustees in a prior action in which the complaint was also dismissed for reasons affirmed by the Circuit Court in this action.[1] Petitioner thereafter added the nominal plaintiff Daniel Jones to the case and reinstated suit.

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1 Alfarone et al v. Nastasi-White, Inc. et al, 84 C 3181 - Append. pgs. 15b through 23b.

STATEMENT OF FACTS

This suit stems from claims by the Union trustees of Local 1974 that contributions and liquidated damages are due to the annuity fund from the various employer defendants in these consolidated appeals. The employer trustees of the funds were joined as defendants because they did not join in bringing these suits. Specifically, plaintiffs claim that by not agreeing with the Union trustees that contributions to the funds were owing from defendant-employers and that a delinquency action should be commenced, the employer trustees breached their fiduciary duty under ERISA. Plaintiffs ask the Court to presume such a breach even though (a) there has been no decision by an arbitrator determining the deadlock on whether suit should be commenced, and no request by any of the

Union trustees that the deadlock be submitted to the arbitration process mandated by the provisions of the LMRA and the trust agreement establishing the funds , and (b) there was a prior decision of the District Court on exactly the same facts which determined that

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2 ARTICLE VII MEETING AND DECISIONS OF TRUSTEES

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Section 5. Majority Vote of Trustees. All action by the Trustees shall be by majority decision. Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in status quo pending arbitration as set forth in Article VIII hereof.

ARTICLE VIII ARBITRATION

Section 1. Application of this Article. In the event the Trustee cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then

footnote continued on following page)

plaintiffs did not have standing to sue, and there was no basis for a claim for contributions. Alfarone v. Nastasi, supra.

In effect, this action represents a second attempt by the Union trustees to sue Employers Nastasi and Circle for

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footnote continued from preceding page)

and in either of such events the Trustees shall attempt to select an impartial arbitrator to hear and determine the matter, issue or dispute.

Section 2. Impartial Arbitrator. If the Trustees cannot agree on an impartial arbitrator within five days, the impartial arbitrator shall be selected from a list of arbitrators to be furnished by the senior judge of the United States District Court in the District in which the fund Office is located. Any Trustee may request such judge to furnish the list of arbitrators.

If the Trustees are unable to agree on an impartial arbitrator from the list submitted by the said judge within seventy-two hours after receipt of such list, the judge may be requested to designate an arbitrator qualified and competent by training and experience to decide the particular issue involved. The hearing shall be held within ten days after the Arbitrator has been selected.

purported delinquent contributions after the complaint in the prior action was dismissed. The only difference in the two actions is that now the Union trustees are joined by a putative participant in the funds to enable them to characterize it with respect to plaintiff, Jones, as a derivative or class action.

The complaint does not allege breach of fair representation of plaintiff, Jones, by Local 1974, nor does it claim the employer defendants hired non-union workers, nor does it claim that any work was done by Local 1974 members for which contributions to the fund were not made.

Concisely put, the complaint merely alleges the defendant-employers hired employees to perform work and that said defendant-employers did not employ members of Local 1974 but, rather, employed

members of another Union, Local 530, to perform work.

The allegations of the complaint must therefore be understood to mean that according to plaintiffs, defendant-contractors should have employed members of Local 1974 and paid contributions to their funds but, instead, employed members of Local 530 and made the contributions required by the appropriate collective bargaining agreement to their funds. In spite of that fact, plaintiffs contend that employer-defendants are obligated to make duplicate contributions as if Local 1974 members had been employed and performed the work. This is clearly a jurisdictional dispute and not a collection action.

By Memorandum and Order dated May 30, 1985, the District Court granted the motion of Nastasi and Circle to dismiss

the complaint in the earlier Alfarone action, based upon two grounds: First, that the Union trustees lacked standing to maintain an action against employers on behalf of the funds because the employer trustees had not agreed to bring suit and the arbitration procedures mandated by Section 302(c)(5) of the Taft Hartley Act, 29 U.S.C., Section 186(c)(5), and by the specific provisions of the trust agreements establishing the funds, had not been fulfilled. The Court also held that the trust agreements required plaintiffs to make a formal demand on the employer trustees and, after a deadlock, to seek the appointment of an arbitrator to resolve the deadlock. Secondly, the Court held that even if the Union had standing, the funds had no claim for contributions because defendants, Nastasi and Circle,

had not hired members of Local 1974 as employees to do the subject work and had paid them no wages.

Approximately two months after dismissal of the Alfarone action, this action was commenced, and it too was subsequently dismissed by the District Court on the grounds that plaintiffs lacked standing and, even if they had standing, they had no present claim for contributions for the reasons stated in the earlier Alfarone-Nastasi case.

In the consolidated appeal, the Court of Appeals affirmed unanimously.

ARGUMENT IN OPPOSITION

Plaintiffs' petition is essentially a restatement of its arguments on the merits presented to the Court of Appeals.

This is not the routine collection case of employers who paid wages and withheld fringe benefits. Here, the work done was assigned pursuant to a Collective Bargaining Agreement with another union, and all wages and benefits were paid by the employer-defendants. Petitioner presumes (as if it were a matter already decided) that there are delinquent contributions and the employer trustees have refused to go out and collect them. That is clearly not this case.

Petitioner Distorts the Holding of the Court Below

Plaintiffs contend the Court of Appeals' holding will render collection

of delinquency contributions more difficult and enable some trustees to block others from suing pending arbitration of a "spurious" issue between them and thereby immunize delinquent employer trustees from responsibility to pay or collect such contributions. That claim is the product of a creative, but erroneous, interpretation of the opinion of the Court below mixed with baseless factual presumptions, and out of context quotes from distinguishable cases in other circuits. Far from undercutting congressional intent, the holding of the Court of Appeals follows uniformly the letter and intent of Congress as expressed in the LMRA and ERISA.

The Court of Appeals held that where a dispute exists among trustees as to whether a suit should be brought, then the provisions of the LMRA and the terms

of the trust agreement must be followed to resolve the deadlock. The Court of Appeals did not hold, as petitioner implies, that arbitration is a condition precedent to bringing all actions for delinquent payments. In the instant case, Jones' action was started against the employer trustees after the District Court had already ruled in the earlier Alfarone-Nastasi case that there was no basis for any claim for contributions.

The Court of Appeals also did not hold that a refusal to bring suit could not be a breach of a fiduciary duty as petitioner implies. It ruled that a breach of fiduciary duty must be established before a derivative suit may be brought. A refusal to file a delinquency action is not in itself a breach of fiduciary duty when, as here, valid reasons exist not to do so. See Iron

Workers v. Bowen 695 F.2d 531, 536 (11th Cir., 1983). Self serving allegations do not a breach of fiduciary duty make, particularly in the light of the May 30, 1985 order in Alfarone-Nastasi that there was no valid claim for contributions. Because employer trustees disagree with their union counterparts and refuse to join in bringing what is tantamount to strike suits against employers, they are being charged with a breach of fiduciary duty. The charge is patently frivolous and suggests bad faith.

It is reckless for petitioner to suggest that the deadlock issue requiring arbitration is a "spurious" one. The wisdom of the employer trustees' position has been amply vindicated by the opinions of the District Court and the Court of Appeals that there is no

basis for a cause of action for unpaid contributions.

It is again reckless for petitioner to suggest the decision in this case has immunized delinquent employer trustees from responsibility. A fair reading of the opinion of the Court of Appeals does not reveal even a hint that a trustee who has acted improperly will be immune from redress according to law.

The Court of Appeals has reaffirmed Congress' intent that employers make contributions to such funds provided employees and employers are equally represented in the administration of the fund, together with such neutral persons as the representatives of the employers and the employees may agree upon, and in the absence of such neutral persons, the trust agreement must provide for arbitration in the case of

deadlock. Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. Section 186(c)(5). The purpose of this equal representation requirement is to prevent misuse of funds by labor officials who would otherwise have sole control of money contributed by the employer. See United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562, 571-72 (1982); National Labor Relations Board v. Amax Coal Co., 453 U.S. 322, 330 n. 13 (1981); Rosenthal v. Ann Service Corp., 571 F.Supp. 1229, 1232 (S.D.N.Y., 1983).

Petitioner Contends the Provisions of ERISA and the Taft-Hartley Act Requiring Equal Representation and Arbitration of Deadlocks have been Repealed Without an Act of Congress

Petitioner strains the patience of the reader when it argues that "fiduciary" as used in Subdivision (g)(2) to Section 502 of ERISA, 29 U.S.C. Section

1132 (g)(2) means one person, and therefore, confers standing on one trustee to bring suit even though the trust agreement requires a majority vote and arbitration to resolve any deadlock. Petitioner has simply chosen to ignore the provisions of Section 402(a) of ERISA. Thus, when Section 502(e)(1) of ERISA and Section 306(g)(1) of MPPAA refer to the jurisdiction of federal courts to hear actions brought by a "fiduciary", those provisions must be read consistently with Section 402(a). To do otherwise is contrary to the well settled rule of construction that all parts of a statute, if possible, are to be given effect, and to the corollary that sections of a statute should be read consistent with one another. See American Textile Manufacturers Institute Inc. v. Donovan, 452 U.S. 490 (1981);

Helvering v. Credit Alliance Corp., 316 U.S. 105, 112 (1942). The named fiduciary provided for in the subject trust agreement are the trustees collectively.[3] Those trustees must exercise their powers jointly[4] and only by a majority vote (see footnote 2 supra). Neither the Taft-Hartley Act, ERISA, nor the trust agreements permit the trustees to act except by majority vote. If it were otherwise, the result of such individual

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3 ARTICLE I DEFINITIONS

Section 4. Trustees.

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(c) The term "Trustees" as used herein shall mean Employer Trustees and Union Trustees collectively, and shall include their successors when acting as Trustees.

4 ARTICLE III TRUSTEES

Section 1. Number. The operation and administration of the Insurance Fund shall be the joint responsibility of three trustees appointed by the Metropolitan New York Dry Wall Contractor Association, Inc. and three trustees appointed by the Union.

action would be the kind of chaos the union trustees have created in these cases. Incredibly, petitioner argues that the existing provisions of ERISA and the Taft-Hartley Act that require equal representation in the administration of the funds and the arbitration of a deadlock have somehow been repealed by implication.

Petitioner's Reference to Post Decisional Events

To excuse their failure, for nearly six years, to follow the simple arbitration procedure mandated by the trust agreement to resolve the deadlock, in a footnote at page 8 of the petition, plaintiffs purport to alert this Court to events occurring after the Court of Appeals' decision which are irrelevant and misleading and should therefore be

disregarded by the Court.[5]

The Holding of the Court of Appeals is in Harmony with Relevent Precedent

Petitioner relies on a litany of cases that are plainly not applicable to this case but are cosmetically attractive for their out of context language. Petitioner also uses selective language from relevant cases to distort their application to the instant case.

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5 Whatever plaintiffs' real motive, when it finally decided to seek arbitration, notwithstanding the simple expedited procedure for arbitration and the safeguard for selecting an impartial arbitrator, it chose to file an unauthorized demand for arbitration with the American Arbitration Association well knowing that the American Arbitration Association had no jurisdiction to hear this dispute and, in fact, declined to do so. The union trustees could simply have demanded the appointment of an arbitrator and if no agreement was reached in five days, petition the District Court to select the arbitrator (see footnote 2 supra.) Instead, plaintiffs steadfastly refuse to follow the plain language of the trust agreement knowing such conduct will surely perpetuate this needless and repetitive litigation.

The basis for petitioner's claim that the holding in the instant case is in conflict with decisions of the Third and Ninth Circuits, specifically Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 924 (3d Cir., 1985) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir., 1984), is at best baffling, if not wholly ingenuous.

In Barrowclough, the Third Circuit held the deferred compensation plan under consideration was specifically exempt from ERISA, that the plaintiff beneficiary was pursuing a personal statutory damage claim under 29 U.S.C. Section 1132(a), and that such a damage claim need not be resolved by arbitration, while claims arising under the plan itself continue to be subject to arbitration. It is clear that Barrowclough dealt with the ultimate

resolution of a beneficiary's personal damage claim. Our case deals with the manner of administering and controlling trust funds by fiduciaries, and the method of breaking deadlocks among fiduciaries as mandated by statute and the provisions of the trust agreement. Plaintiff Jones is not asserting a personal claim to enforce personal rights. See Thornton v. Evans, 692 F.2d 1064, 1079 n.35 (7th Cir. 1982). Barrowclough and the instant case cannot be in conflict because they deal with different subject matter and different issues.

Equally inapposite is Amaro. There the Ninth Circuit was faced with concurrent grievance claims under a collective bargaining agreement which had been submitted to arbitration and a personal statutory damage claim under Section 510 of ERISA. The Court found the personal

damage claim to be independent of collective bargaining rights, and the arbitration decisions did not therefore bar the Federal Court actions. Here too, the Court was not dealing with the rights and duties of fiduciaries in administering trust funds or the congressionally mandated method for joint control of the funds. Again, Amaro, unlike Jones, had a uniquely personal claim to enforce. Arbitration to resolve deadlocks among fiduciaries was not even before the Court. See O'Hare v. General Marine Transport Corp., 740 F.2d 160, 168 (2d Cir. 1984), cert. denied, 105 S.Ct. 1181 (1985). It is less than candid for petitioner to seriously argue that Amaro is in conflict with the holding in the instant case.

Likewise, Central States Pension Fund v. Central Transport, Inc., ____

U.S._____, 105 S.Ct. 2833 (1985), cited by petitioner. In Central States, the Court held that, under the facts of the case, an employer who participates in a multiemployer benefit plan governed by ERISA must allow the plan to conduct an audit involving the records of employees whom the employer denied were participants in the plan. In so holding, the Court noted and agreed with the argument of Central Transport that, in light of ERISA's standards, such an audit request would be illegitimate under the standard of loyalty if it were actually an effort by plan trustees to expand plan coverage beyond the class defined in the plans' terms or to acquire information about the employers to advance union goals. Also, the audit would be imprudent if it were clearly wasteful of plan assets or unrelated to legitimate plan concerns.

105 S.Ct. at 2840, n. 12. Nastasi and Circle suggest that the Court's observations about motive and intent are pertinent to the facts of this case.

Petitioner's reliance upon Nedd v. United Mine Workers, 556 F.2d 190 (3d Cir. 1977) is similarly misplaced. Nedd involved an action by beneficiaries of a fund against the fund trustees and the union for failure to enforce the obligations of employers to make contributions to the fund. The court held that the claim of tortious interference with a collective bargaining agreement by a fund trustee stated a non-frivolous cause of action under Section 301 of the Taft-Hartley Act. 556 F.2d at 198 n. 12. In so holding, the court specifically noted that it did not hold that all breaches of fiduciary duty may be redressed in an action under Section

301, but that sound public policy supported a federal common law cause of action for tortious interference by a pension fund trustee, in violation of his fiduciary duty to the pensioners. 556 F.2d at 198 n. 13.

Petitioner's references to Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984) are misleading in that there were four separate counts passed upon by the Court. Count one was dismissed for reasons not relevant here. Counts two and three were directed against employers for breaching the trust agreements by failing to pay the full amount of contributions and illegally diverting the surplus to their own use. The Court held that the employee-participants had no right of direct action against the employers under either ERISA or the

Taft-Hartley Act for deficient contributions to the trust fund or illegal receipt of the surplus. The court further held that the beneficiaries could not maintain a derivative action against the employers unless they first showed a fiduciary breach in the decision of the employer trustees to return the surplus and require a lower level of employer contributions. 723 F.2d at 336. In so holding, the Court emphasized the importance of protecting the trustees' authority to manage the assets and enforce the rights of the trust fund within the limits imposed by the trustees' fiduciary duties. As the Court stated:

> We recognize the complexity of many trust fund management decisions and the need to allow the trustees to make those decisions free from the second-guessing of less well-informed beneficiaries. The trustees are able, and indeed are obligated, to consider the collective interests of the fund and its beneficiaries, and their performance

> will only be handicapped if we allow individuals to file actions protecting narrower interests without first showing that the trustees have breached their fiduciary duties. 723 F.2d at 337.

Ruling on count four of the Struble complaint, the Court held that the dispute over application of the surplus and the alleged failure to collect the proper amount of employer contributions was properly submitted to an umpire, pursuant to Section 302 of the Taft-Hartley Act and the provisions of the trust agreement, and the Court rejected plaintiffs' claim that the employer trustees had breached their fiduciary duty by referring the dispute over the surplus to the umpire. This is clearly in harmony with the holding in the instant case.

Absent from plaintiff's petition, is any reference to Rosenthal v. Ann Service Corp., 571 F.Supp. 1229 (S.D.N.Y. 1983),

where the Court held upon facts very similar to those in the present case that the plaintiff lacked standing to sue. In Rosenthal, plaintiff, one of the trustees of four taxicab industry trust funds established pursuant to Section 302(c)(5) of the Taft-Hartley Act brought an action under Section 515 of ERISA against nineteen employers for, among other reasons, their alleged failure to make contributions to the funds of which plaintiff was a trustee. Plaintiff also alleged that he was a participant in the funds, as defined by Section 3(7) of ERISA, 29 U.S.C. Section 1002(7). The Court held that permitting plaintiff to bring the suit as trustee for the funds would violate both the Taft-Hartley Act and the relevant trust agreements. In analyzing the relevant

statutory provisions and the trust agreements themselves, the Court noted as follows:

> Exhibits and memorandas submitted by defendants and not challenged by plaintiff satisfy this Court that (the Funds) - administered by equal numbers of union and employer and employee trustees - meet the Taft-Hartley equal representation requirement.[7] (Footnote reproduced below).
>
> Plaintiff's desire to proceed as an individual trustee, without receiving the approval of his co-trustees or even formally presenting to them the grievances that underlie this action, contravenes the letter and spirit of Taft-Hartley and the trust agreements. Moreover, ERISA provides no support for such action. See ERISA Section 514(d), 29 U.S.C. Section 1144(d) (ERISA, with certain

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"7 ... We hold that where trust agreements carefully provide for a system of joint trusteeships, an individual trustee, absent clear language to the contrary, may not thwart the system of joint administration by proceeding as a fiduciary of the collecting agent trust....A contrary result would be unreasonable in light of the general scheme by which the Pension, Welfare, and Training funds are administered and, in addition, would render the benefit plan in violation of Taft-Hartley."

> exceptions, not to "alter, amend, modify, invalidate, impair or supersede any law of the United States"). Rosenthal, 571 F.Supp. at 1232.

The Court in Rosenthal also rejected plaintiff's contention that he had standing to sue as a "participant" under Section 502 of ERISA, 29 U.S.C. 1132. The Court noted that plaintiff was seeking to recover not benefits due to him or to enforce or clarify his rights, but rather was seeking to vindicate the rights of the fund. The Court stated further that the Taft-Hartley safeguard would be an ineffective tool if a trustee and participant in a fund could avoid the strictures on individual action imposed by Taft-Hartley Section 302 by suing in the guise of a "participant." Rosenthal, 571 F.Supp. at 1232.

In granting defendants' motion for summary judgment, the Court in Rosenthal

further noted that a contrary decision would lay the groundwork for law suits by any one trustee, at any time, to advance what is believed to be the best interest of the trust. That, the Court observed, would expose funding employers, the body of trustees, and the trust themselves to the risk of inconsistent obligations and other uncertainties - precisely the type of evil that Taft-Hartley, the trust agreements and ERISA itself aim to eliminate. Rosenthal, 571 F.Supp. at 1232-33.

CONCLUSION

Unions should not be permitted to use ERISA through the union appointed trustees, to bring meritless litigation to further their own jurisdictional aims under threat of sanctions against employer trustees and suits against employers. That is precisely why joint control is required and arbitration is mandated by Taft-Hartley and the terms of the trust agreement to resolve deadlocks among fiduciaries.

The holding of the Court of Appeals in the instant case is clearly in harmony with the intent of Congress and with relevant precedent. Therefore, the

petition for a writ of certiorari

should be denied.

Dated: Garden City, New York
September 15, 1986

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

vs.

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS, INC.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the union-appointed Trustees of a jointly-administered trust fund commence a suit under §502 and §515 of ERISA, when a deadlock exists, between the union-appointed Trustees and the employer-appointed Trustees as to the propriety of bringing suit, without complying with the deadlock provisions in the Declaration of Trust, which governs the Trustees actions?

2. Does a participant in an employee-benefit trust fund, who is not a fiduciary, have a right to bring an action to collect alleged delinquent contributions owed to the fund pursuant

to 29 U.S.C. §1132 prior to a finding that there has been a breach of fiduciary duty on the part of the Trustees where the claim is not a personal claim to the participant, nor does it deal with the provisions of the Fund?

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STATEMENT OF THE CASE

In or about June, 1984 discussion among the Trustees of Tapers Local Union 1974 Insurance and Annuity Funds was had regarding bringing suit against the respondent-employers. After reviewing the evidence presented by the union-appointed Trustees (Petitioners), in support of commencing an action, the three management appointed Trustees disagreed, and decided that it would not be proper to commence a lawsuit at this time. Therefore, the Trustees were deadlocked on this issue.

The Trustees are Trustees of two separate fringe benefit funds: 1) Tapers Industry Insurance Fund, and; 2) Tapers Industry Annuity Fund. While the two Funds were created pursuant to two separate Declarations of Trust, their

provisions with regard to actions by the Trustees are identical.

The Trusts were created under the mandate of 29 U.S.C. §186(c) and are required to be administered by an equal number of union and employer representatives. Article VII, Section 5, of each Trust provides that all actions by Trustees must be by majority decision. It also provides, that if a matter cannot be decided because of a tie vote, or a deadlock, the matter must be submitted to arbitration, as set forth in Article VIII of the Declarations.

However, when the Trustees tied on the issue of whether or not to commence a lawsuit, the subject matter of these appeals, the union-appointed Trustees did not resort to arbitration as per Article VII, section 5 and

Article VIII. The union-appointed Trustees commenced actions against two of the employers and named the employer appointed Trustees as defendants. These two lawsuits were designated, Alfarone, et.al., vs. Bernie Wolff, et. al., 84 Civ. 4028 and, Alfarone, et. al. vs. Component Assembly, Inc., et. al., 84 Civ. 4029.

On or about June 17, 1985, Petitioner, DANIEL JONES, sent a letter to the Trustees, requesting that they commence suit against another employer, NASTASI-WHITE, INC., to collect contributions which he believed were due and owing to the Funds. Counsel for the employer-appointed trustees, notified petitioner JONES, by letter, that they would need additional information to aid them in their decision and that if Petitioner JONES had such information,

he should feel free to submit it. However, no information was ever forthcoming. Therefore, there was never a refusal by the employer-appointed trustees to commence a lawsuit against the employer.

However, on August 5, 1985, petitioner JONES, filed a lawsuit against the employer and the employer-appointed trustees. This suit is named, Daniel Jones, et. al. vs. Nastasi-White, Inc., et. al., 85 Civ. 2908.

On May 30, 1985, the Honorable Eugene H. Nickerson, rendered and filed a decision in a fourth companion case, Alfarone, et. al., vs Nastasi-White, Inc., et. al., 84 Civ. 3181. This action was dismissed on the ground that the plaintiffs had no standing to sue and on the additional ground that no

contributions were due and owing. Based upon the authority of Alfarone vs. Nastasi-White, Inc., Judge Nickerson dismissed the complaint in the three cases now on appeal. The Jones case was dismissed on the additional ground that Jones had no standing to bring his suit.

Petitioners then appealed the decisions of Judge Nickerson to the United States Court of Appeals for the Second Circuit. After argument by all sides the decisions below were affirmed in a decision dated April 14, 1986. The decision was affirmed on three separate and distinct grounds:

1. The kind of work which these employees performed was not within the jurisdiction of the Tapers Union, as determined in, Drywall Tapers and Pointers vs. Operative Plasterer's Association and therefore no contributions were due; and,

2. The Trustees have not exhausted their administrative remedies and therefore the actions were premature; and,

3. A third lawsuit which was commenced by a beneficiary of the Funds was also properly dismissed.

Petitioners then petitioned the Second Circuit Court of Appeals, for rehearing with a suggestion that it be reheard enbanc. On May 22, 1986, the Second Circuit denied this petition.

Petitioners now seek certiorari by the Supreme Court of the United States. For the reasons set forth below, the Court should deny the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

POINT I

No conflict exists between the second circuit's decision below; the third circuit's decision in, Barrowclough v. Kidder, Peabody & Co., Inc., 752 F2d 924 (3d Cir. 1985) and the ninth circuits decision in Amaro v. Continental Can Co., 724 F2d 747 (9th Cir. 1984) with respect to the union-appointed trustees standing to sue without the Employer-Trustees joining. Both Barrowclough, and Amaro, supra, involve situations where an individual commenced an action for benefits which were due to him personally. Therefore, the holdings in both cases, upheld the individual's right to commence an action, pursuant to ERISA, 29 U.S.C.

§1132, without first proceeding to arbitration.

In the case at bar, we are dealing with union-appointed trustees right to commence suit before it has been determined that an employer owes contributions to the funds. There are no personal rights involved.

Additionally, in Barrowclough, supra the fund was not subject to the restrictions of 29 U.S.C. §186(c)(5)(B), since it was an independent fund, not set up in conjunction with a labor organization. Therefore, the fund trustees would not have been subject to the arbitration provisions mandated in 29 U.S.C. §186(C)(5)(B).

The holdings in the above cases, as well as other cases cited to by petitioners, dealing with suits by individuals, have no relation to the

case at bar. So, there is no conflict between the circuits on this issue.

POINT II

No conflict exists between the second circuit's decision below, and the third circuit's decision in, Nedd v. United Mine Workers, 556 F2d 190 (1977) and Struble v. Brewery Employees Welfare Trust Fund, 732 F.2d 325 (1984).

The third circuit, in the above mentioned cases, held that before a beneficiary can commence a lawsuit which does not seek to recover on a personal claim, there must be a determination that the trustees have breached their fiduciary duty. In the case at bar, there was never any determination that the trustees breached their fiduciary duty.

Therefore, there is no conflict between the circuits.

POINT III

There is no conflict between the second circuit's decision below and Congressional policy.

While Congress, intended that "a fiduciary" should have standing to sue to recover delinquent contributions, in the case at bar, there has been no determination that contributions were actually due and owing. In fact, the District Court found that no contributions were owing.

Additionally, there is no conflict between Taft-Hartley and ERISA. Taft-Hartley only requires arbitration when a deadlock (tie-vote)

occurs between the trustees. Once it is determined that there are contributions owing, the trustees would commence an action under the provisions of ERISA. Taft-Hartley imposes absolutely no restrictions on an individual bringing suit for benefits due to him personally.

Therefore, no conflict exists between Congressional policy and the second circuit's decision.

POINT I

NO CONFLICT BETWEEN THE CIRCUITS EXISTS WITH RESPECT TO THE STANDING OF THE UNION-APPOINTED TRUSTEES SO THERE IS NO GROUND FOR REVIEW BY THE SUPREME COURT

Petitioners assert that a conflict between the circuits was created by the Second Circuit's decision below. Petitioners assert that both the Third and Ninth Circuits in Barrowclough vs. Kidder, Peabody & Co., Inc., 752 F2d 924 (3d cir. 1985) and, Amaro vs. Continental Can Co., 724 F.2d 747 (9th Cir. 1984) have found contrary to the Second Circuit. However, both Barrowclough, supra and Amaro, supra are inapposite, as they deal with very different factual situations. Therefore, there is no contradiction between the circuits.

The facts in Barrowclough, supra, are as follows: the suit was

commenced by William Barrowclough, individually for benefits which he believed were due him personally and for an accounting. Barrowclough brought suit against Kidder, Peabody & Co., Inc., his employer, for benefits due pursuant to an Incorporated Deferred Compensation Plan. Since this is a deferred compensation plan, it is only governed by Sections I and V of ERISA. The plan is specifically excluded from Sections III and IV of ERISA. Additionally, since this plan was set up independently, and not with a labor organization, it was not subject to the further restrictions of 29 U.S.C.§183(c)(5)(B) of the Labor-Management Relations Act.

Therefore, essentially Barrowclough is dealing with a situation where an individual is bringing suit

against a non-Taft-Hartley deferred compensation plan.

29 U.S.C. §186, sets up very specific requirements for pension funds where there is a labor organization involved. 29 U.S.C. §186, in general provides that,

> "It should be unlawful for any employer or association of employers...to pay, lend, or deliver, or to agree to pay, lend, or deliver,any money or other thing of value..."

to any employee (other than their normal compensation), representative of employees, or to any labor organization.

29 U.S.C. §186(c), then carves out an exception, to that general restriction. However, there are very explicit requirements entailed in this exception.

The requirement that we are concerned with in this instance is, 29 U.S.C. §186(c)(5)(B), which provides,

> "the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with neutral persons as the reprsentatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office..."

Since, the funds involved here are between a labor organization and an

employer association, they must comply with 29 U.S.C. §186(c). Therefore,

> "[t]he arbitration provision of such trust agreement is, in turn, mandated by Section 302(c)(5)(B) of the Labor Management Relations Act of 1947 ("LMRA"); 29 U.S.C. §186(c)(5)(B) which requires that an agreement of this kind provide for arbitration in matters of administration." (emphasis supplied) Botto vs. Friedberg, 368 F.Supp. 1253 (E.D.N.Y. 1982)

In fact, Article VIII of the subject trust agreements specifically provide for arbitration in accordance with 29 U.S.C. §186(c)(5)(B).

There has been no dispute, that a "deadlock" within the meaning of the statute did occur. After reviewing the evidence presented by the union-appointed trustees, in support of commencing an action against a number of

employers, the employer-appointed trustees disagreed and decided that it would be improper to commence a lawsuit at that time. Therefore, there was a tie-vote as to whether or not to commence an action. As the Court has held in, Enix vs. Burrell, 572 F. Supp. 1364, 1368 (S.D. Ohio 1983),

> "'deadlock', as used in the statute, can be given the latter meaning alluded to in Ader.[An even division of the directors of a corporation in voting.] ...Moreover, all the published decisions concerning §186(c)(5)(B), some of which are cited elsewhere in this opinion, implicitly adopted the 'tie-vote' construction of deadlock."

In addition, there has been no question raised as to whether this dispute was a matter related to the day to day administration of the trust fund. Since the trustees are given the power in the declarations of trust to

> "take any action necessary to enforce payment of the contributions due hereunder, including, but not limited to, proceedings at law and in equity." Article V, Section 4.,

the question whether or not to commence a lawsuit is "left open to the discretion of the trustees by the terms of the trust agreement." Enix, supra at 1369, citing, Ader vs. Hughes, 570 F.2d 303 (10th cir. 1978). Therefore "[i]t is not the type of "extraordinary" matter which should be left to collective bargaining. Enix, id.

Therefore, there is no conflict between the third circuit in Barrowclough, supra and the second circuit in the decision below. Barrowclough, supra, did not deal with a fund which was set up under the requirements of 29 U.S.C.

§186(c)(5)(B). Therefore, there was no statutory requirement to arbitrate the dispute in Barrowclough. However, in the cases for which the writ of certiorari is sought, not only was arbitration mandated by 29 U.S.C. §186(c)(5)(B), but also by the Declaration of Trust for the Funds.

Amaro, supra, also deals with a different fact pattern than the case at bar. In, Amaro, supra, as in Barrowclough, supra, the action was commenced by employees of the defendant, who were participants of the plan. Consequently, the holding which comes out of Amaro, supra, relates specifically to a participant or beneficiary of an ERISA plan, bringing suit for a claim personal to the participant.

> "We conclude that a 'participant' or a

> 'beneficiary' within the meaning of section 3 of ERISA, 29 U.S.C.§1002(7) and (8), is not required to exhaust grievance or arbitration procedures prior to bringing an action under section 510 of ERISA." Amaro, supra at 752.

The trust documents at issue impose no restriction on beneficiaries or participants bringing suit. The only limitation is that imposed by ERISA itself in 29 U.S.C. §1132, on the types of suits which a participant or beneficiary may bring.

Additionally, and most importantly, the second circuit did not find that plaintiff JONES had to arbitrate before bringing suit, on a personal claim, if he had one. The court held that JONES did not bring one of the types of actions enumerated in 29 U.S.C. §1132(a), and therefore he did not have standing individually. Too, he

did not have standing to bring suit derivatively since he did not prove that the trustees had breached their fiduciary duty.

In both Barrowclough, supra, and Amaro, supra, we have decisions by the third and ninth circuits dealing with an individual beneficiary's right to bring suit, for a personal claim, without first arbitrating a claim. While, these two cases affirm a participant's right to bring suit, they have no bearing on the situation at hand. The second circuit's decision below, in, Alfarone et. al. vs Bernie Wolff Construction Corp., et. al., merely stated that, with respect to the trustees, they were governed by the trust documents, as required by 29 U.S.C. §1132(a), and by 29 U.S.C. §186(c)(5)(B) and that,

> "[p]laintiffs' [union - appointed trustees] filing of this suit without ever receiving the approval of a majority of the trustees or employing the arbitration procedure contravenes both the Taft-Hartley Act and the trust agreements. 29 U.S.C. §186(c)(5); see Rosenthal, 571 F. Supp. at 1232." (App. A7a).

Therefore, there is no conflict between the circuits on this issue.

Petitioners also cite to another line of decisions, which the second circuit's decision allegedly contradicts. All of these cases, McKinney vs. Missouri-Kansas-Texas Co., 357 U.S. 265(1958); U.S. Bulk Carriers vs. Arguelles, 400 U.S. 351 (1971); Alexander vs. Gardner-Denver Co., 415 U.S. 36 (1974); Barrentine vs. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) and, McDonald vs. City of West Branch, 466 U.S. 284 (1984) deal with an individual's right to bring

suit, rather than arbitrate a claim. They therefore, create no conflict with the Second Circuit's decision below with respect to trustees standing to sue.

The petitioners then cite to the case of, Central States Pension Fund vs. Central Transport, ____U.S.____, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) to show that the Supreme Court's holding that trustees have a fiduciary responsibility to collect delinquent contributions promptly, was contradicted by the Second Circuit. However, as the Second Circuit states, there was never any conclusion among the trustees as to whether there were delinquent contributions to collect.

> "The trustees of the Funds are evenly divided on whether there is any delinquency in contributions due Local 1974 and whether suit against the employers is justified...".
>
> (Emphasis supplied)
> (App. A 6a)

Therefore, the second circuit did not contradict the Supreme Court with respect to the collection of delinquent contributions, because it was never determined that there were delinquent contributions. This is precisely the issue which an impartial arbitrator would have decided. Judge Nickerson found that there were no contributions owing to the Trustees. This decison was affirmed by the Second Circuit Court of Appeals.

Lastly, petitioners cite to the Supreme Court's decision in, Schneider Moving & Storage Co., vs. Robbins, 466 U.S. 364,104 S.Ct. 1844, 1849 (1984), where the Court held that

> "We conclude, therefore, that the presumption of arbitrability is not a proper rule of construction in determining whether arbitration agreements between the union and the

> employer apply to disputes between trustees and employers..."

The petitioners again state that the Second Circuit contradicted the Supreme Court's decision in the above case. However, that is not the case.

The Supreme Court only resorted to the "presumption of arbitrability" in Schneider, supra, because there was a dispute between the trustees and an employer and no arbitration agreement between the two parties. In the case at bar, the dispute is between the union-appointed trustees and the employer-appointed trustees and there is an arbitration agreement which governs the trustees in this specific situation. It is found in Article VIII of the Declarations of Trust, as required by 29 U.S.C.§186(c)(5)(B). Therefore, there was no need for the

second circuit to rely on a "presumption of arbitrability" in their decision. Therefore, there is no contradiction between the second circuit's decision below and the Supreme Court's decision in Schneider, supra.

Therefore, there is no conflict between the circuits with respect to a union-appointed trustee's right to sue. So there is no ground for review by the Supreme Court.

The Petitioner alleges certain matters, at page 8, footnote 5, as to attempts to obtain, or force the employer-trustees to consent to arbitration, in manners other than as agreed to in the Declaration of Trust. Whilte the allegations are strongly objected to as to their factual accuracy, the allegations are irrelevant, in that they are all post

decisional occurrences, which were not relied upon the Courts in their considerations.

POINT II

NO CONFLICT BETWEEN THE CIRCUITS EXIST WITH RESPECT TO THE STANDING OF A PARTICIPANT OR BENEFICIARY TO SUE INDIVIDUALLY SO THERE IS NO GROUND FOR REVIEW BY THE SUPREME COURT

Petitioners allege that the second circuit's decision regarding DANIEL JONE'S right to sue, is in conflict with the decision of the third circuit in, Nedd vs. United Mine Workers, 556 F.2d 190 (1977) and Struble vs. Brewery Employees Welfare Trust Fund, 732 F2d 325 (1984).

The third circuit in both Nedd, supra and Struble, held

> "If the trustee does not committ a breach of trust in failing or declining to bring an action against the third person, the beneficiaries cannot maintaina suit against the trustee...If it is prudent underthe circumstances to refrain from bringing an

> action, so that the trustee does not violate his duty in so refraining, the beneficiaries cannot compel him to bring the action, nor can they themselves maintain a suit in equity against the third person... We find direct support for our conclusion in an earlier holding of this court. In Nedd, supra..." (emphasis supplied) Struble, supra at 337.

Therefore, before a beneficiary can commence a lawsuit, there must be a determination that the trustees have breached their fiduciary duty. If the trustees have not breached their fiduciary duty, a beneficiary cannot compel them to bring suit.

In the decision of the second circuit, below, the court held,

> "[f]inally, as to Jones' derivative action on behalf of the Funds, such an action can only be brought if the plaintiff first establishes that the trustees breached their fiduciary duty. See Struble, 732 F.2d at 336.

> Jones has failed to establish that the employer-appointed trustees breached their fiduciary duty; their refusal to file a suit to recover contributions allegedly due does not constitute such a breach. See, Ironworkers Local No. 272 vs. Bowen, 695, F2d 531 (11th Cir. 1983)." (App. A9a)

Therefore, it is patently clear that the second circuit, not only did not contradict the third circuit's decision in Struble, supra and Nedd, supra, but relied on the holdings in those cases for its decision. So, there is no conflict between the circuits and therefore no grounds for review by the Supreme Court.

POINT III

NO CONFLICT EXISTS BETWEEN CONGRESSIONAL POLICY AND THE HOLDING OF THE SECOND CIRCUIT SO THERE IS NO GROUND FOR REVIEW BY THE SUPREME COURT

As we stated earlier, in point I, we do not disagree that if it is determined that employers owe contributions to the Funds, suit should be brought to collect on those delinquent contributions. However, in the present case, the trustees never got to the point where there was a determination that contributions were due to the Funds. This is the exact issue on which the Trustees deadlocked.

Also, as stated earlier, there is no conflict between 29 U.S.C. §186(c) (setting forth procedures for administration of the Fund) and 29 U.S.C. §1101, et. seq. (providing for

suit by a fiduciary). 29 U.S.C. §186(C) and the ERISA provisions are two steps in the same procedure. First, you have discussion among the trustees, as to whether an employer is delinquent in making contributions. If a majority of the trustees vote that an employer is delinquent, then they can commence a suit under the ERISA provisions. However, if the trustees deadlock on the delinquency question, an impartial arbitrator has to make that decision. If the arbitrator decides that suit should be brought, the trustees would then bring suit under the ERISA provisions. If the arbitrator decides that there is serious doubt as to whether the employer is delinquent, then there would be no lawsuit. In this manner, the Fund is prevented from wasting their assets on frivolous lawsuits where no contributions are due.

As petitioners continue to repeat,"

> [i]n short, Congress intended that 'a fiduciary' should have standing to sue to enforce §515 and to recover delinquent contributions owed the Trust Fund." (emphasis supplied) (Petitioners brief, p. 14).

We agree that "a fiduciary" does have standing to sue when it has been determined that there are in fact, delinquent contributions. Indeed, the second circuit specifically dealt with any alleged discrepancy between Taft-Hartley and ERISA, with respect to suit by a fiduciary,

> "The limitation in the trust agreement on the powers and duties of less than a majority of the trustees under the instant plans is consistent with the power granted fiduciaries to bring a civil suit under ERISA. ERISA expressly

> requires that the acts of trustees be in acordance with the trust agreements, 29 U.S.C. §1104(a)(1), and expressly contemplates joint administration of trust funds. 29 U.S.C. §1102(a)(1). ERISA does not abrogate the equal representation mandates of the Taft-Hartley Act. 29 U.S.C. §1144(d)." (App A 8a).

Therefore, there is no conflict between Congressional policy and the second circuit's decision with respect to the standing of a trustee to commence a lawsuit.

Petitioners also repeat their assertion that the Court of Appeals undercuts Congressional intent by holding that trustees must always arbitrate before bringing a suit to enforce §515 of ERISA. We reiterate, that this is not the holding of the Court of Appeals, nor the requirements of the Declarations of Trust or 29

U.S.C. §186(c)(5)(B). The Declarations of Trust only require arbitration when there is a "deadlock" between the trustees, pursuant to 29 U.S.C. §186(c)(5)(B). This arbitration would not, as petitioners assert, relieve the trustees of their obligation to collect delinquent contributions. It would merely determine if, pursuant to the Collective Bargaining Agreement and Declaration of Trust, the employer was required to contribute to the Funds, in that particular instance. If the arbitrator determined that the employer was required to contribute to the Fund, the Trustees would be required to commence a lawsuit to collect the delinquent contributions. If at that point they refused to commence an action, the Trustees would be breaching their fiduciary duty and no arbitrator

could arbitrate that question of breach. It would absolutely be a question for the Courts. Therefore, petitioners footnote to Struble, supra, in their brief (Petitioner's brief, p. 14, n.8) is misapplied, because there could be no breach of fiduciary duty until the arbitator determined that an employer owed contributions to the Fund and the trustees refused to commence an action. There is no conflict between Congressional policy and the second circuit's decision.

Petitioners then assert that despite the findings by the second circuit that arbitration was required pursuant to 29 U.S.C. §186(c)(5)(B); that no arbitration should be required in this case, because this was not a matter which involved "the day to day administration" of the Fund. For this

proposition, petitioner cites to the line of cases ending in, Schneider Moving & Storage, Co. v. Robbins, 466 U.S. 364 (1984).

The Supreme Court in Schneider held that,

> "neither the trust agreements nor the Collective Bargaining Agreements at issue have evidenced any intent to condition the contractual right of the trustees to seek judicial enforcement of the trust provisions on exhaustion of the arbitration procedures contained in petitioner's Collective Bargaining Agreements." 104 S. Ct. 1844, 1851 -1852 (1984).

Therefore, the Court never got to the issue of whether or not that dispute was a matter of "day to day administration" because they found that the trustees were not bound by any arbitration provision.

Additionally, the District Court in Enix v. Burrell, supra, gives a very clear distinction between "day to day administration" and "extraordinary matters". Two conditions that should be met for a matter to be considered "day to day administration" (and therefore within the purview of 29 U.S.C. §186(c)(5)(B)) are: 1) it should be a matter left to the discretion of the trustees in the trust agreement; and 2) it is not a matter governed by the Collective Bargaining Agreement and/or Collective Bargaining process. Clearly, the determination as to whether an employer is delinquent and the method of collecting the delinquency is specifically left to the trustees in the Declarations of Trust. Additionally, these matters are not matters which can be determined by the Collective

Bargaining Agreement and/or the Collective Bargaining process.

Therefore, the issue of whether an employee owes contributions is a matter of "day to day administration "of the trust fund and therefore subject to the arbitration provisions of 29 U.S.C. §186(c)(5)(B).

In the remainder, of petitioner's brief (petitioners brief, p. 15-20) he reiterates arguments addressed previously in this brief, see points I and II. Therefore, we will not burden the Court with a reiteration of our arguments at this point.

CONCLUSION

FOR THESE REASONS SET FORTH ABOVE, A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT COURT OF APPEALS.

Respectfully submitted,
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No. 86-502

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

—against—

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS, INC.,

Respondents.

BRIEF OF RESPONDENT, COMPONENT ASSEMBLY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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H 21

QUESTIONS PRESENTED FOR REVIEW

1. Do the collection provisions of ERISA, 29 U.S.C. Section 1145, abrogate the equal representation provisions of the LMRA, 29 U.S.C. Section 186(c)(5) and the express language of the underlying employee benefit plan trusts under which contributions are allegedly due ?

2. Do the union appointed trustees of an employee benefit plan have standing to litigate in Federal Court a union jurisdictional dispute in the guise of an ERISA collection suit, where such trustees are not a majority and have not sought to arbitrate a trustee deadlock, despite the explicit requirement that they do so contained in the governing trust agreements and 29 U.S.C. Section 186(c)(5)?

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QUESTIONS PRESENTED FOR REVIEW

1. Do the collection provisions of ERISA, 29 U.S.C. Section 1145, abrogate the equal representation provisions of the LMRA, 29 U.S.C. Section 186(c)(5) and the express language of the underlying employee benefit plan trusts under which contributions are allegedly due ?

2. Do the union appointed trustees of an employee benefit plan have standing to litigate in Federal Court a union jurisdictional dispute in the guise of an ERISA collection suit, where such trustees are not a majority and have not sought to arbitrate a trustee deadlock, despite the explicit requirement that they do so contained in the governing trust agreements and 29 U.S.C. Section 186(c)(5)?

STATEMENT OF THE CASE

The genesis of these consolidated appeals is a long-standing jurisdictional dispute between two building trades unions operating in the New York Metropolitan area. Although the underlying dispute was deemed of so little moment to this Court that a petition for certiorari was denied after its resolution by the Court of Appeals in 1979, Drywall Tapers and Pointers of Greater New York v. Operative Plasterers' & Cement Masons' International Ass'n., 601 F.2d 675 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), petitioners have sought to continue litigating that already decided case by trying to posture it as a claim under the Employees Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1101 et seq.

Petitioners, who are the union-appointed trustees of two separate employee benefit funds ("the Funds") established for the benefit of members of Local 1974 of the Drywall Tapers and Pointers Union ("Local 1974"), postured their jurisdictional battle as an ERISA dispute in the following manner. Claiming that work done by members of the competing Local 530 of the Operative Plasters and Cement Masons International Association ("Local 530") was work which should have been done by members of their union, they recommended that lawsuits be brought against several employers, including Component Assembly, Inc., for not having made contributions to the Funds in respect of the disputed work. The employer-appointed trustees, however, did not acquiesce in plaintiffs' tactics

and voted against the commencement of such actions, thus creating a deadlock.

The applicable trust fund agreements ("the Trust Agreements") each require a majority vote of the six trustees for "all actions",[1] as is required by applicable provisions of the Labor Management Reporting Act of 1947, 29 U.S.C. Section 186(c)(5) ("LMRA"). The Trust Agreements also contain statutorily mandated provisions for arbitration in the event of a deadlock among the trustees. See Trust Agreements, Article VII, Section 5 and 29 U.S.C. Section 186(c)(5).

In complete derogation of the provisions of the Trust Agreements and LMRA, petitioners, without demanding

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[1] Article VII, Section 5 of the Trust Agreement, reproduced at Page 8, footnote 2 of the Brief in Opposition of Nastasi-White, Inc. and quoted by the Court of Appeals at 6a of the Appendix; 788 F.2d at 78.

arbitration, commenced a series of lawsuits against three employers, Component Assembly, Inc., Bernie Wolff Construction Corp. and Nastasi-White, Inc. (collectively "defendants") Each sought damages in excess of $3,000,000. However, petitioners never alleged that contributions were not made to the Funds in respect of work allegedly performed by members of Local 1974. Nor did petitioners allege that persons who performed work for or on behalf of the defendants did not receive contributions to the employee benefit funds in which they were participants.

On May 30, 1984, District Judge Eugene H. Nickeson dismissed one of petitioners' complaints in an action entitled Alfarone v. Nastasi White, Inc., 84 C 3181, a case which is not one of the three consolidated matters which

is the subject of the petition. In its decision, the District Court held that the plaintiffs, who represented a minority of the six trustees of the Funds, had no standing to proceed. After analyzing the Trust Agreements and LMRA the District Court stated:

> "Both the trust agreements and the Taft-Hartley Act make it clear that plaintiffs alone cannot maintain the suit..." (Appendix B 20b).

The District Court thereafter dismissed the complaints in the actions against Component Assembly, Inc. and Bernie Wolff Construction Corp. herein, relying on its decision in the Nastasi-White matter (Appendix 13b and 14b).

The Court of Appeals (Pollack, J.) unanimously affirmed the judgments of the District Court. 788 F.2d 76 (2d Cir. 1986);(Appendix 1a - 9a). The Court of Appeals found;

(a) that the Trust Agreements specifically require that "all actions by the Trustees shall be by majority decision", including proceedings at law to enforce the payment of contributions, 788 F.2d at 78 (Appendix 6a);

(b) the Trust Agreements expressly required that, "in the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in status quo pending arbitration" 788 F.2d at 78, (Appendix 7a); and

(c) that such provisions were mandated by Section 302(c)(5) of LMRA, 29 U.S.C. Section 186(c)(5). 788 F.2d at 79 (Appendix 7A).

Based on those findings, the Court of Appeals held that;

> "Plaintiffs' filing of this suit without either receiving the approval of a majority of

> the trustees or employing the arbitration procedure contravenes both the Taft-Hartley Act and the trust agreements." 788 F.2d at 79 (Appendix 7a).

The Court of Appeals also flatly rejected plaintiffs' contention that the collection provisions of ERISA somehow supersede the language of the agreements and the mandates of LMRA Section 302(c)(5). The Court of Appeals pointed out that ERISA contains an express requirement of compliance with trust agreements, 29 U.S.C. Section 1104(a)(1)(D), and that ERISA specifically does not abrogate the equal

representation mandates of LMRA, 29 U.S.C. Section 1144(d). [2]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

In an attempt to construct reasons why this Court should exercise its discretion to grant certiorari, plaintiffs have seriously mis-stated the letter and spirit of the Court of Appeals holding. Thus, they have sought to portray a holding that Sections 402

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[2] The third of these three consolidated appeals, Jones v. Nastasi-White, which was brought by an alleged participant of the Funds was also dismissed by the District Court and its, dismissal was affirmed by the Court of Appeals. No such claim by an alleged individual participant was made against Component Assembly, Inc. However, component joins in the assertions and arguments made by respondents Nastasi-White, Inc. and the Employer-Trustees with respect to the reasons why the writ should be denied as to the individual claims.

and 404 of ERISA abrogate neither the express language of the Trust Agreements, nor Section 302(c)(5) of LMRA, as a determination that arbitration is a pre-condition to commencing an ERISA collection action. This mistaken portrayal of the holding below is the building block upon which petitioners' assertions that there is a conflict between the circuits and a conflict between the holding below and the congressional policy underlying ERISA is lain. However, the actual holding does not conflict with holdings of the Court of Appeals for the Third and Ninth Circuits. Nor does it conflict with congressional policy as set forth in the applicable statutes or with prior decisions of this Court. Accordingly, there is no reason why certiorari should be granted.

A. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioners' assertion that the Court of Appeals' holdings herein conflicts with determinations of the Third and Ninth Circuits in Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923 (3rd Cir. 1985) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984) is based entirely upon their above-described misreading of the actual holding of the Court of Appeals in these appeals. Moreover, those assertions utterly ignore the many significant distinctions between those two cases and the instant ones. Indeed, upon close analysis, the rationale of the Barrowclough and Amaro courts support the Court of Appeals' finding that federal policy favors exhaustion of remedies in ERISA cases, particularly here where the

trustees are mandated to arbitrate first, by LMRA and the applicable trust agreements.

To begin with, the claim in Barrowclough did not involve an employee benefit fund created under a collective bargaining agreement (and, therefore, governed by LMRA Section 302(c)(5)). Nor was the fund administered by a board of trustees. Thus, the crucial question of whether the plaintiff had to comply with express provisions of a governing document and with LMRA equal representation provisions before commencing suit never came into play.

The \ ERISA claims in Barrowclough involved a claim by a previously discharged stock broker for an accounting and for the payment of benefits under an unfunded deferred

compensation plan established for managerial and highly paid employees; a plan exempted from the bulk of ERISA's requirements. 752 F.2d at 930-931. Plaintiff was a party to a standard arbitration agreement submitting "all disputes arising out of his employment" to the New York Stock Exchange, 752 F.2d at 927-928 an agreement which fell far outside the purview of LMRA.

The Court of Appeals in Barrowclough held that plaintiff could pursue his claim for an accounting under 29 U.S.C. Section 1132(c) without first proceeding to arbitration. 752 F.2d at 940. Because that particular claim was for a purely statutory remedy, i.e. damages under 29 U.S.C. Section 1132(c) for failure to comply with 29 U.S.C. Section 1025 (rendering an accounting on demand), the Court of Appeals held that

it fell exclusively within the jurisdiction of the federal courts. Id.

However, in the instant case, petitioners, as they themselves have described it, are not seeking to enforce a purely statutory right. Rather, they are seeking the payment of benefits to the Funds, a contractual right. Under the holding of Barrowclough which relates to that type of claim, contractual arbitration is a bar to proceeding in the federal courts. 752 F.2d at 939-940.

Nor is Amaro helpful to petitioners' assertion that there is a conflict between the Circuits. The question before that court was whether employees claiming that they were laid off for the purpose of limiting their eligibility for pension and welfare benefits in violation of Section 510 of ERISA, 29 U.S.C. Section 1140, had to

first exhaust grievance procedures under a collective bargaining agreement before commencing suit. The Court of Appeals held that no such exhaustion was required, primarily because the question was purely statutory and because it did not involve the interpretation of an underlying employee benefit plan containing internal appeal procedures. 724 F.2d at 751-752.

The question in the instant matter is a far cry from the questions facing the courts Amaro and Barrowclough. The arbitration required by the Court of Appeals is not the arbitration of a purely statutory claim that an individual has been denied a substantive ERISA right. It isn't even a question of a contractual entitlement to benefits.[3]

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[3] Under the holdings of both Barrowclough and Amaro, even if the arbitration to which deferral is required covered the underlying claim for the

Thus, to suggest that this internal dispute as to the propriety of bringing an ERISA lawsuit as a second front in a lengthy war over union jurisdiction is the enforcement of a purely statutory right under ERISA, is misleading, to say the least.

The pertinent authorities, including those of the Ninth Circuit relied upon in the Amaro decision, are in complete harmony with the determination of the Court of Appeals herein. The court in Amaro dealt extensively with its prior decision in Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980). Amato involved a claim by a participant in a union employee benefit plan that the trustees wrongfully denied his claim for

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payment of benefits, that would be arbitration of contractual rather than statutory rights and thus a bar to litigation in the federal courts. See Barrowclough, 752 F.2d at 939; Amaro, 724 F.2d at 751.

benefits. The court held that the participant was required to exhaust internal appeal procedures set forth in the plan documents. 618 F.2d at 567. In so doing, it relied on two well established principles clearly applicable here and which two principles comprise the "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases" referred to by the Court of Appeals in this matter. 788 F.2d at 79 (Appendix 8a).

The first principle is that "the legislative history of ERISA forges an explicit link between suits under ERISA and suits under Section 301 of the LMRA...and part of that law [applicable to LMRA suits] has been that where administrative remedies are available, they must usually be exhausted by aggrieved party before his Section 301

complaint will be heard..." 618 F.2d at 599 (citations omitted). The second principle is that ERISA itself requires that plans contain administrative remedies for individual claim disputes. See 29 U.S.C. Section 1133. The Amato court reasoned that the existence of such procedures and the policy favoring their use required their exhaustion as a predicate to an ERISA lawsuit:

> "The text of ERISA and the policies underlying that text, far from suggesting that Congress intended to abrogate the exhaustion requirement in the case of suits under ERISA or that sound policy would counsel its abrogation by the courts, suggest just the opposite." Amato v. Bernard, supra, 618 F.2d at 567.

Significantly, the Amaro court did not overrule Amato; instead it harmonized that case with its own holding. Where, as here and in Amato, there were administrative procedures in

the plan designed to afford a forum for the resolution of the claims presented, and those procedures were mandated by Congress, (as they were here pursuant to 302(c)(5) of LMRA) the exhaustion requirement must be enforced. Amaro supra, at 724 F.2d 751.

B. NOTHING DETERMINED BY THE COURT OF APPEALS "RUNS COUNTER" TO THIS COURT'S HOLDINGS IN SCHNEIDER MOVING & STORAGE CO. V. ROBBINS

In a misguided effort to concoct "reasons" for granting the writ where none in fact exist, petitioners allege that the Court of Appeals' holding "appears to run counter" to this court's holdings in Schneider Moving and Storage Co. v. Robbins, 466 U.S. 364 (1984) and Central States Pension Fund v. Central Transport, Inc., ____ U.S. ____, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985).

These claims simply do not withstand analysis.

Petitioners claim that Schneider stands for the proposition "that no presumption of arbitrability under the collective bargaining agreement is applicable to ERISA delinquency collection suits." (Petition p. 16) This contention both ignores and distorts the facts of both Schneider and this case.

First, this case is not a "delinquency collection" case. No matter how many times petitioners inject that phrase into these proceedings, it does not change the facts. The employers here are obligated under 515 of ERISA (29 U.S.C. 1145) and the Trust Agreements to "make such contributions in accordance with the terms and conditions of such plan of agreement."

Under the Trust Agreements, the employers are obligated to make contributions when a Local 1974 employee "performs work". Although petitioners assiduously avoid saying so, it is undisputed that Local 1974 employees did not perform any of the work for which "delinquent contributions" are now sought; rather Local 530 performed such work. Therefore, as the Second Circuit correctly found:

> "No claim is made by plaintiffs that Local 1974 members have performed work for which benefit contributors are due". 788 F.2d at 78 (Appendix 5(a)).

Second, and critical to understanding this court's decision in Schneider, there was no requirement which compelled the trustees to arbitrate in the trust agreements in Schneider. Indeed, this court noted that there was absolutely nothing in the Schneider trust

agreements which expressly mandated that the trustees arbitrate. Absent such an express condition or any evidence that the parties intended such a condition, there was no requirement of arbitration as a condition precedent to an ERISA suit.

Here, there is an explicit provision in the Trust Agreements,[4]

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[4] "Article VII, Section 5. All actions by the Trustees shall be by majority decision. Such majority vote shall govern not only this Article but any portion of this Agreement and Declaration of Trust which refers to action by the Trustees. In the event any matter presented for decision cannot be decided because of a tie vote, the matter shall remain in status quo pending arbitration as set forth in Article VIII hereof.

* * * * *

Article VIII, Section 1. In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote or in the event decisions cannot be made because of the lack of a quorum at two successive meetings of the Trustees, then and in either of such events the Trustees shall attempt to select an impartial

in accordance with 302(c)(5) of LMRA, requiring the trustees to arbitrate in the case of deadlock.

There can be no better evidence of what the parties' agreement provided, and what they intended. Thus petitioners selective out of context quotations from Schneider have no application to the facts before this court.

C. THE COURT OF APPEALS' DECISION DOES NOT UNDERCUT ANY CONGRESSIONAL POLICY REGARDING ERISA COLLECTION MATTERS

Petitioners, by selectively choosing certain phrases from portions of ERISA, and utterly ignoring other relevant provisions, as well as the Trust Agreements and LMRA, contend that the Court of Appeals' decision here undercuts

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arbitrator to hear and determine the matter, issue or dispute..."

the "Congressional intent" behind ERISA. (Petition pp. 13-14).

This argument distorts both the plain meaning of the statutes and the Trust Agreements. There is no "conflict" between LMRA, ERISA and the holding below; nor did the Court of Appeals, overrule, implicitly or otherwise, the relevant provisions of ERISA.

To the contrary, this Court has consistently held that the parties must abide by 302(c)(5) and the terms of their agreements. E.g., Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., ____ U.S. ____, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985);, National Labor Relations Board v. Amax Coal Co., 453 U.S. 322, rehearing denied, 453 U.S. 950, (1981). Therefore, there is nothing of

any significance for this Court to determine and thus the writ should be denied.

The, congressional intent with respect to the interplay among LMRA, ERISA and the clear language of the Trust Agreements is readily gleaned from the statute itself. Sections 402(a)(1) and (2) of ERISA, (29 U.S.C. 1102(a)(1), which petitioners studiously avoid, provide that ERISA covered plans must be maintained pursuant to a written agreement delineating the plans' fiduciaries:

> "(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.
> (2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary

> who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly (Emphasis supplied).

Thus, Congressional intent as expressed in the statute requires that the language of the agreements and the language of companion statutes be followed, not abrogated. This renders petitioners' "undercutting" argument not worthy of this Court's time.

The Trust Agreements herein defined a board of six trustees as the "fiduciary" and specifically delineate that control and management is joint, not several, by requiring majority approval of "all actions" as required by LMRA Section 302 (c)(5), 29 U.S.C. Section 186(c)(5).

More importantly, ERISA Section 514, 29 U.S.C. Section 1144(d) provides that nothing in ERISA should be construed to "alter, amend, modify, invalidate, impair or supersede any law of the United States." That language certainly includes LMRA and its equal representation and arbitration of deadlock requirements.

Recent decisions by this Court are entirely consistent with the plain statutory mandate requiring adherence to underlying plan documents and to LMRA. They therefore lay to rest any question that ERISA somehow excuses compliance. In Schneider Moving and Storage Co. v. Robbins, supra, this Court specifically held that the ability of trustees to seek a judicial remedy rather than arbitrate must be ascertained from the parties' intent as reflected in the relevant trust

agreements. See also 29 U.S.C. 1104 (a)(1)(D); 404 of ERISA.

Similarly, in National Labor Relations Board v. Amax Coal Co., supra, this Court specifically noted that disputes between trustees regarding ERISA matters must be the subject of arbitration, or the equal representation scheme outlined in LMRA would be meaningless:

> "...[w]hereas Congress has expressly rejected compulsory arbitration as a means of resolving collective-bargaining disputes, Section 302(c)(5) explicitly provides for the compulsory resolution of any deadlocks among welfare fund trustees by a neutral umpire . Compare 29 U.S.C. Section 158(d) with 29 U.S.C. Section 186(c)(5);
>
> * * * *
>
> [a] trustee deadlock over eligibility matters, like any other deadlock, must be submitted to the compulsory resolution procedure established by Sec. 302(c)(5)" NLRB v. Amax Coal Co., supra, at 453 U.S. 337-338.

Nothing in Amax creates or even suggests that ERISA'S collection sections create an exception to the policy that trustees must seek to resolve their deadlock by arbitration, and not by precipitous resort to the Federal Courts.

Despite petitioners' protestations, nothing in Central States, supra, suggests the existence of such an exception to the general principle of the harmonization of trust agreements, LMRA and ERISA. To the contrary, Central States reiterates the need for bi-lateral administration of employee benefit trusts by representatives of unions and management.

As pertinent to the instant matter, Central States, dealt with the question of whether employee benefit plan trustees had to await a union prosecution of agreements under a separate collective

bargaining agreement before seeking to enforce employers' obligations under ERISA. This Court rejected the employers' claim that enforcement by trustees had to await union grievance arbitration. However, it did not, as petitioners suggest, do so because of an overall policy disfavoring arbitration among trustees. Rather, the basis of this Court's opinion was that requiring grievance arbitration to proceed would place primary reliance for ERISA enforcement upon unions, a result which the Court found inimicable to the spirit and purpose of ERISA. Thus, the Court at _____ U.S. _____, 105 S.Ct. 2842-3 stated,:

> "the notion that federal policy favors union enforcement of an employer's collectively-bargained obligations to a benefit plan, to the exclusion of enforcement by the plan's trustees, simply did not survive last Term's decision in Schneider Moving and Storage

> Co. v. Robbins, 466 U.S. 364 , (1984). In Schneider, we held that a benefit plan could bring an independent action for judicial enforcement of an employer's trust obligations and we in large part relied on the proposition that there was no federal policy favoring trustee dependence on a union's use of a grievance and arbitration system for such enforcement.
>
> Of greatest significance here is this Court's conclusion that compelling benefit plans to rely on unions would erode the protections ERISA assures the beneficiaries, for the diminishment of trustee responsibility that would result would not necessarily be made up for by the union. ERISA places strict duties on trustees with respect to the interests of beneficiaries and unions' duties towards beneficiaries are of quite a different scope."

This Court then, citing Schneider, supra, distinguished between the duties of a union, which run only to the members of its collective bargaining unit and the duties of trustees, to provide specific benefits under the terms

of a plan. _____ U.S. ____, 105 S.Ct. at 2843.

This Court next cited National Labor Relations Board v. Amax Coal Co., supra for the proposition that

> "[t]he atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by [29 U.S.C. Section 186(c)(5)] and ERISA, is wholly inconsistent with th[e] process of compromise and economic pressure [that characterizes collective bargaining]". ____U.S. _____ at ____, 105 S.Ct. at 2844, citing 453 U.S. 322 at 336.

Thus, this Court has made it clear in Central States that the interests of unions and the interests of trustees as fiduciaries under ERISA are not coterminous. Therefore, it would be a complete derogation of the rationale and holding of Central States to claim that union trustees, acting entirely on their own and in violation of the Trust

Agreements and the equal representation provisions of LMRA may proceed to litigate ERISA claims. Such a result would give credence to actions by union representatives in their capacity as advocates for their bargaining unit rather than as representatives of a fiduciary unit created by the written agreements.

As if there were any question but that Central States does not carve out an exception to LMRA in ERISA proceedings, the Court should note the statement found in footnote 10 to its opinion in Central States, _____ U.S. at _____, 105 S.Ct. at 2840, which cites Amax Coal, supra for the proposition that

> "Congress intended that union welfare funds regulated by the Taft-Hartley Act, See 29 U.S.C. Section 186(c)(5), be operated under traditional trust law principles and this desire became explicit in ERISA".

Clearly, there is no inconsistency between ERISA and LMRA. The LMRA equal representation provisions embodied in 29 U.S.C. Section 186(c)(5) are an integral and essential part of ERISA and may not be cast aside under a claim that they impede swift enforcement of allegedly delinquent contributions, particluarly here where there is no credible allegation, let alone finding, of delinquent contributions.

If the contrary position advanced by petitioners is upheld, it would lay the groundwork

> "for lawsuits by any one trustee, at any time, to advance what is believed to be the best interests of the trust. This would expose funding employers, the body of trustees, and the trusts themselves to the risk of inconsistent obligations and other uncertainties -- precisely the type of evil that the [LMRA], the trust

agreements, and ERISA itself aim to eliminate."

Rosenthal v. Ann Service Corp., 571 F. Supp. 1229, 1232-33 (S.D.N.Y. 1983)

CONCLUSION

FOR THE REASONS SET FORTH HEREIN, THE WRIT SHOULD BE DENIED.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

against

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., and QUICK-WAY FINISHERS INC.,

Respondents.

PETITIONERS' REPLY BRIEF

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In the

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October Term, 1986

No. 86-264

JOHN ALFARONE, JOSEPH GIORDANO and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES, individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be or have at any time since July 1, 1980 been participants or beneficiares in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

-against-

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY, INC., NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP. AND QUICK-WAY FINISHERS, INC.,

Respondents.

PETITIONERS' REPLY BRIEF

Preliminary

The first-named Respondent, Bernie Wolff Construction Corp., has not served a brief in opposition to the Petition for Certiorari. Each of the other Respondents has, however. The three such briefs will, for convenience, be referred to below as "Component," "Nastasi" and "Employer Trustees," and page references thereto will be given after such identi fying names.

1. Each of the employers is bound by the bargaining agreements to pay contributions

Neither Component nor Nastasi denies that it entered into the successive bargaining agreements, with Local 1974, in 1980 and again in 1983, which obligate it to pay contributions to the Petitioners' funds. Neither of the two employers denies that it has, during the six-year period covered by the two agreements, per-

formed work covered by the bargaining agreements. From these uncontested facts, the obligation of each Respondent employer to pay contributions to the Funds is clear.

Nastasi argues (page 14) that it signed another agreement with another union and paid wages and benefits in accordance with that other agreement. Even if proven, however, that assertion would be irrelevant: Nastasi is required, by its bargaining agreements with Local 1974, to pay contributions to Petitioners' funds. It cannot pick and choose. Cf. O'Hare v. General Marine Transport Corp., 740 F.2d 160, 170 (2d Cir. 1984) ("It was obliged to pay into the funds established by the Agreement").

2. This suit is not brought by or for Local 1974

Component (page 2-3) and Nastasi

(page 5) accuse Petitioners, the union-appointed trustees of two employee-benefit funds, of pursuing an ulterior purpose: namely, of seeking to vindicate Local 1974's jurisdictional rights.

To buttress its assertion, Nastasi (pages 10-11) mis-describes the complaints in these actions and asserts that they "mean" that the employers employed members of another union instead of members of Local 1974 to perform the work in question. A similar mis-description may have misled the Second Circuit (see: Pet.Cert.,App.A, page 5a).

The complaints in these actions make no such allegation. They do not allege that Local 1974 members should have been employed; and they do not allege that members of another union were. What they do allege (see: Pet.Cert., pages 4-5) is that Respondent employers performed

(either through persons employed directly or through non-signatory subcontractors) work covered by the bargaining agreements and thereby became obligated to pay contributions to the funds, but have failed to pay such contributions.

It is irrelevant to this action whether the persons employed were or were not members of Local 1974. The employers' obligation to pay contributions to the funds is the same whether they were or were not.* And the complaints do not say whether they were or not.

---

* As previously noted, Pet. Cert. pages 6-7, n. 4, the district court expressed, by comment, a different view; see: Pet. Cert.App. 12b, 13b, 14b, 21b. Its view, as noted, is mistaken. Moreover, in each instance the court made its comment after it had found lack of standing. Its comments were therefore dicta and have no juridical weight. Cf. Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1279 (7th Cir. 1983); Spatt v. New York, 361 F.Supp. 1048, 1051-1053 (E.D. N.Y.)(three-judge court), aff'd by order 414 U.S. 1058 (1973).

Apparently also in support of their accusation, Component (page 2) and Nastasi (page 5) cite Drywall Tapers v. Operative Plasterers, 601 F.2d 675 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), in which Local 1974 protested dismissal (eight years ago) of certain damage claims against other unions.

Drywall Tapers has no apparent relevance here. As the Petitition for Certiorari in that case (docketed as No. 79-779) points out (at pages 8, 9), an AFL-CIO Hearings Panel had rendered a jurisdictional award in which it "ruled for Painters and thus for Local 1974" on the submitted jurisdictional question but then proceeded to "moot" Local 1974's claims for damages for the other unions' past violations on the ground that "This decision, now supersedes and renders moot all controversies arising out of

past assignemnts, and this decision contains full and final relief for all claims ... and no further relief whatsoever is warranted."

It was the latter ruling, "mooting" Local 1974's claims for further relief from the other unions, that Local 1974 challenged unsuccessfully in Drywall Tapers, supra; see: Ibid, 601 F.2d at 678.

That decision is obviously irrelevant here. These suits are brought, not to recover relief for Local 1974 but to collect contributions due the funds. No claim of injury to Local 1974 or of infringement of its jurisdictional rights is made. It seeks to protect the funds, their participants and beneficiaries.

3. Each trustee is "a fiduciary"

Component (page 26) and Nastasi (pages 19-21) argue that the phrase, "a fiduciary," as used in § 502(e)(1) and (g)-

(2) of ERISA, 29 U.S.C. § 1132(e)(1) and (g)(2), cannot refer to one person but can only refer to all trustees collectively.

If their argument were sound, use of the plural ("fiduciaries") would be an absurdity; and the phrase, "another fiduciary," would be meaningless. Compare: §§ 402(a) ("one or more named fiduciaries") and 405 ("another fiduciary"; "such other fiduciary"); 29 U.S.C. §§ 1102(a), 1105(a).

§ 403(a) of ERISA, 29 U.S.C. 1103(a), makes clear that the persons described in § 402(a) as "named fiduciaries" are the trustees of the plan. And by its use of the plural, § 402(a) makes clear that the term is not used collectively: that, i.e., each trustee is a "named fiduciary."

Reading § 502(e)(1) and (g)(2) con-

sistently with §§ 402(a), 403(a) and 405(a) (as Nastasi, page 20, correctly reminds us we must) thus compels the result that suit to enforce § 515 of ERISA and to thereby recover for a plan contributions due it may be brought, pursuant to § 502(e)(1) and (g)(2), by any (or by any several) of the trustees of the plan. That result is plainly in accord with Congress's policy. See: Pet. Cert., pages 11, 12, 17-18.

4. Respondents have not succeeded in resolving the conflict between Circuits and with this Court

Each Respondent attempts to distinguish those decisions of other Circuits and of this Court that hold that a contract to arbitrate should not bar a suit to enforce a statutory right; thus:

Component (pages 14-15) argues that § 515 of ERISA does not create a statutory right; in its view, Congress la-

bored toward no end at all.

Nastasi (pages 24-26) and Employer Trustees (pages 20-26) argue that the right to sue on a statutory claim despite a contract to arbitrate applies only to individual claims; delinquency collection, say they, enjoys less favored status.

Neither Respondent offers any authority to support its attempted distinction. Nor can either distinction be rationally defended. Congress regarded delinquency collection as having a high priority and therefore created a statutory right where none had existed. The public interest in prompt delinquency collection is not inferior to the public interest in individual claims.

Respectfully submitted,

BURTON H. HALL*
WENDY E. SLOAN

* Counsel of Record.

No. 86-264

Supreme Court, U.S.
FILED
OCT 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

—against—

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NATASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS, INC.,

Respondents.

BRIEF OF RESPONDENT BERNIE WOLFF CONSTRUCTION CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD LIEB*
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Questions Presented.

1. Whether ERISA* repeals the LMRA** equal representation rule to permit individual union-appointed trustees of a union employee benefit trust fund to sue in violation of the terms of the trust.

2. Whether an individual union member can bring a derivative ERISA suit on the claim that the employer-appointed trustees breached their fiduciary duty by disagreeing with the union-appointed trustees.

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* Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq.

** The Labor Management Relations Act of 1947, 29 U.S.C. §§ 141 et seq.

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Statutes Involved.

Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"):

ERISA § 3, 29 U.S.C. § 1002
ERISA § 402, 29 U.S.C. § 1102
ERISA § 403, 29 U.S.C. § 1103
ERISA § 404, 29 U.S.C. § 1104
ERISA § 405, 29 U.S.C. § 1105
ERISA § 502, 29 U.S.C. § 1132
ERISA § 514, 29 U.S.C. § 1144
ERISA § 515, 29 U.S.C. § 1145

Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 141 et seq. ("LMRA"):

LMRA § 302, 29 U.S.C. § 186

The pertinent provisions are set forth in the Statutory Appendix.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOHN ALFARONE, JOSEPH GIORDANO, and BRIAN GORDON, as Trustees of the Tapers Industry Insurance Fund and of the Tapers Industry Annuity Fund, DANIEL JONES individually and as a participant in the Tapers Industry Insurance and Annuity Funds, and on behalf of all other persons who are, will be, or have at any time since July 1, 1980 been participants or beneficiaries in the said funds, similarly situated, and UNION APPOINTED TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS,

Petitioners,

-against-

BERNIE WOLFF CONSTRUCTION CORP., EMPLOYER TRUSTEES OF THE TAPERS INDUSTRY INSURANCE AND ANNUITY FUNDS, COMPONENT ASSEMBLY INC., NASTASI-WHITE, INC., CIRCLE INDUSTRIES CORP., AND QUICK-WAY FINISHERS INC.,

Respondents.

BRIEF OF RESPONDENT BERNIE WOLFF CONSTRUCTION CORP. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement of the Case.

This purported ERISA[1] suit is really a tactic in a long-standing jurisdictional dispute between two unions (A5-6, 12, 17-18):[2] the Dry Wall Tapers and Pointers of Greater New York Local 1974 ("Local 1974") and the Operative Plasterers' and Cement Masons International Association, Local 530 ("Local 530").[3]

The three union-appointed trustees of the Local 1974 annuity and pension

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[1] Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 et seq. and particularly Section 515, 29 U.S.C. § 1145.

[2] References preceded by the letter "A" are to the pages of the Appendix to the Petition for Certiorari.

[3] See Drywall Tapers & Pointers of Greater New York, Local 1974 v. Operative Plasterers' & Cement Masons' International Association, 601 F.2d 675 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980) for the prior history of this persistent dispute.

funds (the "Local 1974 Funds") wanted to sue various employers under ERISA to compel benefit contributions to the Local 1974 Funds (and impose statutory penalties) on account of work done by Local 530 members. A 5-6, 12, 17.

The three employer-appointed trustees did not agree. The union trustees sued the employers anyway and named the employer trustees as defendants.

The United States District Court for the Eastern District of New York dismissed for lack of standing. The LMRA equal representation rule[4] and the Local 1974 Funds' trust agreements both

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[4] The Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §§ 141 et seq., and particularly Section 302(c)(5), 29 U.S.C. § 186(c)(5). The "equal representation rule" requires joint administration of union trust funds by equal numbers of employer and union-appointed trustees and prescribes the arbitration of any deadlocks. Id.

required the Local 1974 Funds to act only through a majority of the six trustees or, in the event of deadlock, an arbitrator's decision. Without such a consensus or a decision the trustees had no standing. Judge Nickerson also held that there were no benefit contributions due since no wages had been earned by Local 1974 members. A 15-23.

Then, the union trustees sought to realign the employer trustees as plaintiffs to cure the standing problem. They also brought forth a union member, Jones, to intervene as a class action and derivative plaintiff to carry the union's position. The District Court refused realignment and intervention. And, in one case, it dismissed Jones' separate complaint. A 11, 13, 14, 15.

The Decision Below and the Present Petition.

The United States Court of Appeals for the Second Circuit affirmed and denied rehearing. A 1-9, 10.

Without the approval of a majority of the trustees or of an arbitrator after deadlock, the union trustees had no standing to sue under ERISA or otherwise. Both the LMRA and the trust agreements forbid unilateral trustee action. And ERISA did "not abrogate the equal representation mandates" of the LMRA and the trusts. A 8.

The union-interwenor, Jones, also lacked ERISA standing. He did not seek personal benefits or injunctive relief, and so had no direct right of action. He had no derivative standing either. The employer trustees' refusal to sue did not amount to the proven fiduciary

breach required as the prerequisite to ERISA derivative litigation by Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3rd Cir. 1984). A 8-9.

The union trustees and their proposed intervenor now seek a writ of certiorari urging that the decision below conflicts with the Congressional intent behind ERISA and the decisions of other circuits.

Summary of Argument.

It is respectfully submitted that ERISA did not repeal the LMRA equal representation rule to permit individual trustees to sue alone in violation of the terms of their trusts. Nor has ERISA or any circuit empowered an individual fund participant to sue derivatively merely by claiming that the em-

ployer trustees have breached fiduciary duties simply by disagreeing with union trustees. That would repeal the LMRA equal representation rule.

There is no conflict in the circuits. There has been no frustration of Congressional intent.

Argument.

1. The decision below serves the Congressional policy behind ERISA and the LMRA.

The Second Circuit recognized, as this Court has, that ERISA and the LMRA equal representation rule are complementary, not conflicting. Both apply harmoniously to union pension and welfare funds covered by ERISA. See NLRB v. Amax Coal Co., 453 U.S. 322 (1981).

ERISA and the LMRA equal representation rule together create "the atmosphere" in which union pension and wel-

fare fund trustees must operate. NLRB v. Amax Coal Co., supra, 453 U.S. at 336. ERISA creates a closely knit enforcement scheme which precludes the expansion of standing or remedies by inference. See Massachusetts Mutual Life Ins. Co. v. Russell, ___ U.S. ___, 87 L.Ed.2d 96, 106-07 (1985). ERISA certainly did not repeal the LMRA equal representation rule by inference. Id.

LMRA Section 302(c)(5) commands the inclusion of its equal representation rule in every union pension or benefit fund agreement as a condition of its existence. 29 U.S.C. § 186(c)(5); NLRB v. Amax Coal Co., supra, 453 U.S. at 325, 328-33.

The LMRA equal representation rule is meant to insure that union trustees cannot use their power as trustees to

advance a union agenda, cannot use a fund "as a union 'war chest'", and cannot use their trust power to force contributions not required by the governing collective bargaining agreement. NLRB v. Amax Coal Co., supra, 453 U.S. at 328, 336.

Trustees must act "in accordance with" their trust and collective bargaining agreements, as long as these agreements are "consistent" with ERISA. See ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1259, 1261 n.9 (5th Cir. 1980) ("Ironworkers I").

This Court has recognized that Congress intended the LMRA equal representation rule to continue to govern union pension and welfare funds under

ERISA.[5] NLRB v. Amax Coal Co., supra, 453 U.S. at 336-38; Central States Pension Fund v. Central Transport, Inc., 472 U.S. ____, 86 L.Ed.2d 447, 452 (1985); Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 88 (1982) (ERISA Section 515 does not repeal antitrust or labor laws); cf. ERISA § 514(d), 29 U.S.C. § 1144(d).

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[5] The 1980 ERISA amendments grant individual trustees no additional powers. The new sections (29 U.S.C. §§ 1145 and 1132(g)(2)) were merely intended to induce employers who owe contributions to benefit funds to make those payments promptly. See, e.g., discussion of legislative history in Central States, Southeast & Southwest Areas Pension Fund v. Alco Express Co., 522 F. Supp. 919, 926-28 (E.D. Mich. 1981); cf. Central States Pension Fund v. Central Transport, Inc., 472 U.S. ____, 86 L.Ed.2d 447, 459 n.16 (1985); Morse v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 180, 187 (W.D.N.Y. 1983), aff'd per curiam sub nom. Building Trades v. New York State Teamsters Conference, 761 F.2d 115 (2d Cir. 1985). Standing remains as defined by ERISA § 502(a), 29 U.S.C. § 1132(a), the standing provision of ERISA. See Massachusetts Mutual Life Ins. Co. v. Russell, supra, 87 L.Ed.2d at 106.

Thus ERISA, consistent with the LMRA, defines trustees' powers by the terms of the trust agreements (including the LMRA-required equal representation rule), the common law of trusts, and the express provisions of ERISA itself. See Central States Pension Fund v. Central Transport, Inc., supra, 472 U.S. at ____, 86 L.Ed.2d at 454, 456, 458-59, 465; Ironworkers Local No. 272 v. Bowen, 695 F.2d 531 (11th Cir. 1983) ("Ironworkers II"); Morse v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 180, 186 (W.D.N.Y. 1983), aff'd per curiam sub nom. Building Trades v. New York State Teamsters Conference, 761 F.2d 115 (2d Cir. 1985).

As required by the LMRA equal representation rule, the Local 1974

Funds' trust agreements reserve the power to sue (as well as all other decisions) to a majority of the six trustees acting as a body, with deadlocks to be resolved by arbitration.[6] A 6-8. This is entirely consistent with ERISA.

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[6] Suit for employer contributions is an "administrative" trust function under LMRA Section 302 and thus requires a majority trustee vote or arbitration of a trustee deadlock. 29 U.S.C. § 186(c)(5). See NLRB v. Amax Coal Co., supra, 453 U.S. at 336-38; Ironworkers II, supra; Rosenthal v. Ann Service Corp., 571 F. Supp. 1229, 1232-33 (S.D.N.Y. 1983). Any power given to the trustees by the trust instrument is an "administrative" power. Barrett v. Miller, 276 F.2d 429 (2d Cir. 1960); Mahoney v. Fisher, 277 F.2d 5 (2d Cir. 1960); Singleton v. Abramson, 336 F. Supp. 754 (S.D.N.Y. 1971); see also Hawkins v. Bennett, 704 F.2d 1157, 1160 (9th Cir. 1983). Plaintiffs' suggestion that the decision to initiate a lawsuit is inherently inarbitrable and that a dispute over whether to sue is not cognizable under ERISA directly contradicts the holdings in Ironworkers I and II and conflicts with the rationale of Struble v. New Jersey Brewery Employees' Welfare Trust Fund, supra, 732 F.2d at 335. Plaintiffs' reliance on Farmer v. Fisher, 586 F.2d 1226 (8th Cir. 1978), overruled en banc, Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433 (8th Cir. 1983), aff'd sub nom. Schneider Mov-

(Footnote continued)

Nothing in ERISA guarantees any individual trustee the power to sue or take any other unilateral action. ERISA Sections 402, 403 and 405 expressly authorize joint control of trust affairs and restrict individual trustees' duties and powers accordingly. 29 U.S.C. §§ 1102(a), 1103(a), 1105(b).

Only a "fiduciary" can sue to collect allegedly delinquent contributions.[7] And, by definition, one is a

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(Footnote 6 continued from previous page)
ing & Storage Co. v. Robbins, 466 U.S. 364 (1984) is misplaced. Farmer was not a suit under ERISA, did not mention ERISA, and did not hold that suit is not a matter of "trust administration." It addressed the question of whether, under the specific terms of the agreements at issue, a given dispute "arose from" the trust agreement or from the collective bargaining agreement, not whether the decision to sue involved "administration."

[7] See ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2) (contemplating only suits brought by a "fiduciary for or on behalf of a plan"); ERISA § 515, 29 U.S.C. § 1145 (contributions due "in
(Footnote continued)

"fiduciary" under ERISA only if, and "to the extent" that, one has discretionary control and authority granted by ERISA-consistent trust instruments. ERISA § 3(21)(a), 29 U.S.C. § 1002 (21)(a); Thornton v. Evans, 692 F.2d 1064, 1077, 1079 n.35 (7th Cir. 1982).

Since fiduciary status under ERISA is determined by the trust agreement, where, as here, a trust agreement reserves the discretionary power to sue, and thus the "fiduciary" duty and power to sue, to a majority of the "Employer Trustees and the Union Trustees collectively," individual trustees -- union or management -- do not have individual standing to sue as "a fiduciary."

(Footnote 7 continued from previous page)
accordance with" the terms of the applicable trust and collective bargaining agreements).

The court below was correct in so ruling. A contrary ruling would have permitted the union trustees to misuse the Local 1974 Funds and ERISA to pursue the union's own jurisdictional agenda.

Trustees cannot use ERISA to "advance union goals" in "an effort . . . to expand plan coverage beyond the class defined in the plan's terms," or to engage in other activities "unrelated to legitimate plan concerns." Central States Pension Fund v. Central Transport, Inc., supra, 472 U.S. at ____, 86 L.Ed.2d at 458 n.12.

That is exactly what is afoot here. The Local 1974 union-trustees' ERISA suit is an obvious effort to advance Local 1974's position in its persistent

jurisdictional dispute with Local 530 by imposing significant litigation expenses and exposure on employers who use Local 530 members.

The decision below stopped this abuse of ERISA -- correctly.

Any other decision would have lain the

> "groundwork for lawsuits by any one trustee, at any time, to advance what is believed to be the best interests of the trust. This would expose funding employers, the body of trustees, and the trusts themselves to the risk of inconsistent obligations and uncertainties -- precisely the type of evil that [the LMRA], the trust agreements, and ERISA itself aim to eliminate."

Rosenthal v. Ann Service Corp., 571 F. Supp. 1229, 1232-33 (S.D.N.Y. 1983).

The court below was also correct in holding that the union's proposed intervenor, Jones, lacks derivative standing.

The union trustees (and the union) cannot avoid the LMRA equal representation rule and pursue the union jurisdictional agenda under color of ERISA litigation by the ruse of joining a union member as a derivative plaintiff. That would, indeed, thwart the Congressional mandate. It would, in fact, effectively repeal the LMRA equal representation rule.

> "We note that the Taft-Hartley safeguard would be an ineffective tool if a trustee and participant in a fund could avoid the strictures on individual action imposed by Taft-Hartley § 302 by suing in the guise of a 'participant.'"

Rosenthal v. Ann Service Corp., supra, 571 F. Supp. at 1233.

There is no perversion of Congressional policy in the decision below.

2. The decision below is consistent with the decisions of the other circuits.

The Second Circuit faced the issue of whether the union trustees, acting alone, could sue to enforce their perception of an alleged contractual right to contributions without first exhausting the LMRA-prescribed arbitration of the trustees' deadlock on the preliminary question of whether to sue.

Neither Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923 (3d Cir. 1985); nor Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984); nor Struble v. New Jersey Brewery Employees' Welfare Trust Fund, supra, dealt with this issue.

Barrowclough and Amaro hold that statutory remedies to enforce statutory (not contract) rights cannot be denied through reference to collective bargaining arbitration of the merits of the claim. Burke v. Latrobe Steel Co., 775 F.2d 88, 90-91 (3d Cir. 1985); see also Zipf v. American Telephone & Telegraph Co., No. 85-3420, slip op. (3d Cir. August 27, 1986).

But, under ERISA, "claims seeking to enforce the terms of a pension plan . . . are subject to a contractually required arbitration process." Id.; see also Barrowclough, supra, 752 F.2d at 939.

There is no purely statutory right at issue here. Employer contribution obligations are defined by trust agreements and collective bargaining agree-

ments, not by the statute. ERISA imposes no independent statutory obligation to contribute.

ERISA's purpose is only "to protect contractually defined benefits." Massachusetts Mutual Life Ins. Co. v. Russell, supra, 87 L.Ed.2d at 107. ERISA only requires employers to contribute "in accordance with" the terms and conditions of the trust and collective bargaining agreements. Any obligation derives from the agreement not the statute. See ERISA § 515, 29 U.S.C. § 1145.

The union trustees propose to use ERISA to enforce their own view of terms of the collective bargaining agreement. They say it requires contributions to the Local 1974 Funds whether work is done by Local 530 members or by Local 1974 members.

The ultimate resolution of the jurisdictional dispute which drives this suit lies in the normal labor arbitral process, not ERISA. See, e.g., Drywall Tapers & Pointers of Greater New York, Local 1974 v. Operative Plasterer's & Cement Mason's International Association, supra, 601 F.2d at 677-78. No overriding policy permits ERISA litigation merely because employee benefits may be incidentally affected by the outcome. Viggiano v. Shenango China Division of Anchor Hocking Corp., 750 F.2d 276, 279-81 (3d Cir. 1984).

Barrowclough would agree:

> "We conclude the most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are

> subject to arbitration, [citing Viggiano], while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate. [Citing Amaro.] Under the distinction we make between statutory and contractual claims, ERISA neither completely supplants nor is completely subordinate to arbitration."

Barrowclough v. Kidder, Peabody & Co., Inc., supra, 752 F.2d at 939 (footnote and other citations omitted).

This suit is grounded in the union's own view of the requirements of the collective bargaining agreement. The union trustees and the Local 1974 Funds have no greater rights than these agreements give them. The case is spawned by the agreements and the union's juridictional agenda, not the statute. There is no conflict with

Amaro or Barrowclough. Burke v. Latrobe Steel Co., supra.

The decision below also squares with the ERISA holdings of the Third Circuit in Struble and later cases, and with the LMRA holding in Nedd v. United Mine Workers of America, 556 F.2d 190 (3d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

Struble and Nedd concern the propriety of derivative actions against employers, but not the interaction between the LMRA equal representation rule and ERISA.

Nedd permits derivative litigation under the LMRA only where the trustees have "wrongfully" failed to sue. Struble permits a suit against trustees and -- after the establishment of fiduciary breach -- a derivative suit

against employers to recover any benefits obtained as a direct result of the trustees' proven self dealing. McMahon v. McDowell, 794 F.2d 100, 109 (3d Cir. 1986).

Neither the union trustees nor their proposed intervenor, Jones, has proven the sort of trustee defalcation required by the Third Circuit to establish ERISA derivative standing against employers.[8]

A trustee's failure to sue or to agree to sue is not itself a fiduciary breach. See McMahon v. McDowell, supra, 794 F.2d at 110; Ironworkers II, supra,

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[8] The Petition For a Writ of Certiorari does not challenge the Second Circuit's ruling that proposed intervenor Jones was properly denied both standing under the LMRA and standing to pursue a direct action under ERISA. Therefore, those points are not addressed here.

695 F.2d at 536; Challenger v. Local Union No. 1 of the International Bridge, Structural and Ornamental Iron Workers, 619 F.2d 645, 649 (7th Cir. 1980) ("Challenger").

Here, the employer trustees have done nothing more than refuse to join the union trustees in their ERISA-colored jurisdictional attack on Local 530 -- an attack that is, itself, an improper use of a trust office and, thus, a fiduciary breach.

The union trustees cannot use their office to "require employer contributions not required by the original collectively bargained contract. . . ." NLRB v. Amax Coal Co., supra, 453 U.S.

at 336 (quoting Arroyo v. United States, 359 U.S. 419 (1959)).[9]

They cannot use ERISA to advance the union's jurisdictional agenda. Central States Pension Fund v. Central Transport Inc, supra, 472 U.S. at ___, 86 L.Ed. 2d at 458 n.12.

The refusal to join the union adventure, hardly wrongful, is insufficient to support a derivative suit under Nedd, Struble, or McMahon. A charge of difference of opinion in construing an agreement is not a charge of fiduciary breach. See McMahon v. McDowell, supra, 794 F.2d at 108-110; Ironworkers II,

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[9] Cf. Kaiser Steel Corp. v. Mullins, supra, 455 U.S. at 84 (discussing the National Labor Relations Act Section 8(e) and noting that the "touchstone" is "protection of neutral employers . . . caught in the middle of a union's dispute with a third party").

supra, 695 F.2d at 536; Challenger, supra, 619 F.2d at 649.

No circuit has ruled that ERISA impliedly repeals the LMRA equal representation rule. None has ruled that the LMRA equal representation rule can be avoided by derivative litigation by union members.

There is no conflict with the decision below.

Conclusion.

The employer defendants were not charged with employing Local 1974 members while failing to make contributions to their benefit funds. There is no claim that the employers hired non-union workers. The charge is that the employment of Local 530 employees entitles the Local 1974 Funds to benefit contribu-

tions based on the work done by the Local 530 members.

This is a jurisdictional dispute, not an ERISA collection action. However, the union trustees have not complied with the trust instruments, ERISA, or the LMRA. They have no standing. Their proposed intervenor has not cured this deficiency.

This case has nothing to do with ERISA. It was correctly decided below in harmony with Congressional intent and the decisions of other circuits.

There is no occasion for a writ of certiorari.

Dated: New York, New York
October 8, 1986

Respectfully submitted,

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* Counsel of Record

Statutory Appendix.

29 U.S.C. § 186. Restrictions on financial transactions

(c) Exceptions

(5) [With] respect to money or other thing of value paid to a trust fund . . .: Provided, That

(A) such payments are held in trust . . .;

(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of

their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office. . . .

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(21)(A) [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority

or discretionary responsibility in the administration of such plan. . . .

29 U.S.C. § 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. . . .

29 U.S.C. § 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the

trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan. . . .

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1105. Liability for breach of co-fiduciary

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees--

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan. . . .

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce

his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for approriate relief in the case of a violation of 1025(c) of this title;

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

* * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

* * *

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan --

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of --

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C § 1144.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such plan or such agreement.